IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
PRIDE COMPANIES, L.P.,	§	CASE NO. 01-10041-11
	§	
Debtor.	§	

PRIDE COMPANIES, L.P.,	§	
	§	
Plaintiff	§	
	§	
V.	§	ADVERSARY NO. 01-1002
	§	
VÄRDE PARTNERS, INC.	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact

A. Parties

1. Pride Companies, L.P. ("Pride") was formed as a limited partnership under the laws of the State of Delaware in January 1990. (P. Ex. 1; Vol. 1, p. 77). Pride's corporate offices and headquarters are located in Abilene, Texas.

2. Pride's Chief Executive Officer and Treasurer is Brad Stephens. (Vol. 2, p. 331). Pride's President and Chief Operating Officer is Wayne Malone. (Vol. 3, p. 602). Pride's Vice President and General Counsel is Dave Caddell. (Vol. 1, p. 72). Pride's Chief Financial Officer is George Percival. (Vol. 4, p. 982). Collectively, these parties are referred to as "Management".

3. Pride Refining, Inc. ("Pride Refining"), a Texas corporation, serves as the managing general partner of Pride. (*See* P. Ex. 2).

4. Pride SGP, Inc. ("Pride SGP") serves as Pride's special general partner. (*See* P. Ex. 2).

5. Pride Marketing of Texas (Cedar Wind), Inc. is a Texas corporation.

6. Pride's principal business consists of marketing military aviation fuel, conventional gasoline and low sulphur diesel fuel. Pride's primary market area for refined products includes central and west Texas. Pride generated approximately $131 million of gross revenues in 1999, and $234 million in gross revenues for 2000, excluding the DFSC Proceeds.

7. Värde Partners, Inc. ("Värde") is a Delaware corporation, whose principal place of business is in Minneapolis, Minnesota. Värde manages several investment funds. Värde invests primarily in non-investment grade debt and sub-performing or non-performing debt.

8. George Hicks, Greg McMillan and Marcia Page are equal shareholders of Värde Partners, Inc. (Vol.4, p. 940). George Hicks is a corporate lawyer and the principal of Värde who negotiated with Pride and signed the agreements in dispute on behalf of Värde. (Vol. 3, p. 745; Vol. 4, p. 954). Jason Spaeth is employed by Värde as an investment analyst. (Vol 2, p. 433). He is the only investment analyst assigned to the Pride investment. (Vol. 2, p. 435).

B. <u>The DFSC Lawsuit</u>

9. In September 1995, Pride filed a claim against the United States Defense Fuel Supply Center ("DFSC"), one of its primary aviation fuel customers, alleging that the DFSC had substantially underpaid Pride for fuel purchased over a period of several years (the "DFSC" Claim"). (Vol. 1, pp. 80-82). Pride sought to recover a sum certain of $47.8 million on the contracts in *quantum meruit*, plus interest. (Vol. 1, pp. 81-82). Pride assigned to the law firm of McKenna & Cuneo, its attorneys in the DFSC case, a contingent fee interest in the lawsuit Pride brought against the DFSC. (Vol. 1, p. 80).

C. Värde's Purchase of Pride Debt from NationsBank

10. Between 1990 and 1997, Pride had a banking relationship with NationsBank, N.A, by which NationsBank extended to Pride a number of term loans and a line of credit facility. During this time, Pride experienced financial difficulties, which it contends were caused in part because of bad management decisions by a former CEO and compliance with the Clean Air Act of 1994 which required Pride to expend substantial sums at its refinery. (Vol. 1, pp. 82-83). Pride was therefore in and out of default on loan covenants; its loan with NationsBank was classified by bank regulators. NationsBank, therefore, sought a buyer to acquire the Pride debt at a substantial discount. (Vol. 1, pp. 82-83; Vol. 2, p. 337).

11. Pride Management initiated lending discussions with one of the directors of Pride, Craig Sincock, and with representatives of BankBoston. (Vol. 1, pp. 85-86). Pride retained an investment firm, Simmons & Co., to help Pride find a new credit facility. (Vol. 1, p. 86). The Pride Board of Directors and management, in conjunction with Simmons & Co., had determined that Pride had the ability to service a debt of approximately $20 million. (Vol. 1, p. 88). Its management was considering jointly purchasing, along with a bank, a portion of the debt. (Vol. 1, p. 88). Pride was then contacted by a company called CRT about a potential lender, Värde Partners, Inc. (Vol. l, p.91). Pride had had no prior dealings with Värde. (Vol. 1, p. 91). After an initial meeting with Värde, Värde's principal, Mr. Hicks, advised Pride that he had contracted with NationsBank to buy Pride's debt. (Vol. 1, p. 93).

12. After a series of meetings and negotiations, Värde and Pride signed a letter of intent on November 18, 1997. (P. Ex. 111). The letter of intent expressly disclaimed that it constituted a binding obligation or creation of rights in favor of any person. (P. Ex. 111, STE 20045).

13. The DFSC lawsuit was still pending at the time of the Värde-Pride negotiations in September through December 1997, and the uncertain potential for a recovery of an uncertain amount

was known to Värde and addressed in the parties' drafts of agreements. The letter of intent addressed the DFSC Proceeds as follows: "Litigation proceeds will be used to retire Senior Debt B or New Preferred Unit A, whichever is outstanding. Any excess will be split one-third to Värde and two-thirds to Pride." (P. Ex. 111, STE 20048). The application of the excess of DFSC Proceeds by either Pride or Värde to debt and equity is not addressed.

14. The letter of intent also states that Värde requires Management to purchase a one-third interest in Series Debt B and various subordinate securities, which purchase is to be funded by a note payable to Värde. (P. Ex. 111, STE -20047).

15. Because Värde is an investment company, it was not able to provide Pride with the credit facility it needed to support Pride's purchase or exchange of crude oil and petroleum products. Therefore, with Värde's approval and participation, Pride negotiated and obtained such a credit facility with BankBoston. (P. Exs. 23, 39; Vol. 1, pp. 115-16). On November 17, 1997, BankBoston signed a letter committing to provide to Pride a secured letter of credit and revolving credit facility in an aggregate amount of $65 million. (P. Ex. 23). BankBoston also agreed to provide a term loan in an aggregate amount of $21 million to refinance or "take out" Värde's Series A Term Loan upon the satisfaction of certain conditions. (P. Exs. 23, 39. STE 018071).

16. On November 24, 1997, Värde and NationsBank executed an Assignment Agreement whereby Värde agreed to purchase Pride's debt from NationsBank. *(See* P. Ex. 2, STE 000299).

17. Beginning with the first draft of the Sixth Restated and Amended Credit Agreement, prepared by Värde's counsel, Paul Weiss, Section 2.7(e) regarding "Proceeds from Legal Claims" provided that (paraphrasing):

> (x) the first $6 million of the DFSC Proceeds would be applied to reduce the Series A Term loan;

(y) the next $5 million would be applied to reduce the Series B Term Loans; and

(z) the remainder would be paid two-thirds to Pride (and not be applied to prepay 1oans) and one-third to Värde (and applied to redeem debt or preferred equity).

(See Ex. 26, STE 013244-45). Except for the draft dated December 22, 1997, all other drafts of the Sixth Restated and Amended Credit Agreement contained similar wording requiring that Värde apply its one-third of the DFSC Proceeds to repay and redeem debt and equity. (P. Ex. 31, STE 013350; P. Ex. 33, STE 013593).

18. In the one exception, the draft of the Sixth Restated and Amended Credit Agreement prepared by Värde's counsel on December 22, 1997, Section 2.7(e) contained language giving Värde one-third of the DFSC Proceeds outright as a "transaction fee." (P. Ex. 3, STE 013489-90; Vol. 1, pp. 126-28). This proposal was rejected by Pride, and the next draft of the Credit Agreement eliminates the "transaction fee" language and returns to the language requiring application of Värde's one-third to debt and equity. (P. Ex. 33; Vol. 1, p. 128). The final integrated agreements contained no provision referencing a "transaction fee" in relation to the DFSC Proceeds. (Vol. 1, pp. 128-29). Pride Management testified that Pride would never have signed the documents or agreed to the deal if the "transaction fee" language had not been eliminated from the Credit Agreement. (Vol. 1, pp. 129-30; Vol. 4, p. 983).

19. A provision added late, on or about December 29, 1997, granted Värde a new $2.8 million security, called the Series D units. (Vol. 1, pp. 133-34; Vol. 1, pp. 140-41; P. Ex. 36, STE 020724-26).

20. The first draft of the Restructuring and Override Agreement (circulated by Värde's counsel on December 11, 1997, the same date the first draft of the Credit Agreement was circulated) contained Section 1.4(a), which provided that Värde was to receive one-third of any DFSC

Proceeds after application of the funds to repay or redeem Senior Debt B or New Preferred A. (Ex. 27, STE 020448). After reviewing this draft, Pride or its attorney noted for Värde's counsel that the section needed to conform to Section 4.3.5 of the BankBoston Credit Agreement. (Vol. 1, p. 139; P. Ex. 27, STE 020448).

21. Section 4.3.5 of the BankBoston Agreement is similar to Section 2.7(e) of the Credit Agreement. Section 4.3.5 addresses "Proceeds from Legal Claims" provided that (paraphrasing):

> (x) the first $6 million or less of DFSC Proceeds would be applied to reduce the Term Loan;
>
> (y) the next $5 million of DFSC Proceeds would redeem Värde Securities (defined as indebtedness of Pride to Värde and the Series B, C, and D Preferred Units and New Preferred Units A, B, and C); and
>
> (z) the remainder would be paid two-thirds to Pride (and need not be applied to prepay the Term Loan) and one-third to Värde (and must be applied to redeem Värde Securities).

(*See* P. Ex. 39, STE 018085). Section 4.3.5 also provided that payment on the Värde Securities under Section 4.3.5 could not occur if an event of default under the BankBoston Agreement had occurred and was continuing. (P. Ex. 39, STE 018085).

22. Section 1.4(a) in the next two drafts of the Restructuring and Override Agreement conformed to Section 4.3.5 of the BankBoston Credit Agreement regarding the required application of $6 million to redeem the Series A Term Loan and the next $5 million to ratably reduce the Series B Term Loans, but the drafts did not contain the requirement that Värde's one-third had to be applied to the debt and securities, as did Section 4.3.5. (P. Ex. 34, STE 015656).

23. The December 30, 1997 draft of Section 1.4(a), however, added the language requiring that Värde apply its one-third of the DFSC Proceeds to the extent, if any, required by Section 4.3.5 of the "BankBoston Agreement," as defined in the Restructuring and Override Agreement. (P. Ex. 37, STE 005337-38). The addition of that language adopting 4.3.5 of the BankBoston Agreement

attached as Exhibit E to the Restructuring Agreement conformed Section 1.4(a) to Section 2.7(e) of the Credit Agreement. (Vol. 1, p. 142).

24. After the negotiations concluded and the documents were in essentially final form, Dave Caddell, Pride's General Counsel, had a conversation with Värde's counsel, Andy Rosenberg, in New York, just before the documents were signed. (Vol. 1, p. 194). Rosenberg acknowledged, and expressed his displeasure with, the fact that Värde was not to receive the one-third allocation outright as a transaction fee under the terms of the integrated contract. (Vol. 1, pp. 194-95). Caddell reminded Rosenberg that that had always been the deal. (Vol. 1, p. 195). Mr. Rosenberg was not called as a witness by Värde although he still represents Värde, and Värde offered no evidence by deposition or otherwise that contradicts Mr. Caddell's testimony regarding this conversation. (Vol. 3, p. 771).

25. Effective December 30, 1997, Pride and Värde executed the final versions of the various integrated documents restructuring the terms and provisions of the indebtedness including: (1) the Restructuring and Override Agreement ("Restructuring Agreement"), and (2) the Sixth Restated and Amended Credit Agreement ("Credit Agreement"), wherein Pride Companies, L.P. is the borrower, Pride Refining, Inc. is a guarantor, Pride SGP, Inc. is a guarantor, Pride Marketing of Texas (Cedar Wind), Inc. is a guarantor, and Värde is the lender. At the same time, as part of the same transaction, Pride and BankBoston executed the BankBoston Agreement as of December 30, 1997. (P. Ex. 39).

26. The NationsBank indebtedness as of December 30, 1997 (approximately $45.8 million) was sold by NationsBank to Värde for approximately $24.3 million, representing a $21.5 million discount from the face amount of the indebtedness. (Vol. 2, pp. 295-98). Värde also provided an additional $4.7 million in working capital to Pride, for a total investment of $29 million. In addition, Värde charged Pride a fee of $3.3 million, described by Pride as a "transaction fee." The transaction fee was paid with (1) $500,000 represented by the Series B-2 Term Loan as originally contemplated in the letter of

intent, and (2) the delivery of Series D Preferred Units in the amount of $2,757,067, which series of securities was not contemplated in the letter of intent and was demanded by Värde at the last minute. (Vol. 1, pp. 133-34).

27. The Restructuring Agreement restructured the debt that Pride owed to NationsBank (P. Ex. 2). The Restructuring Agreement expressly provided that Pride would execute the Credit Agreement and various Loan Documents "reflecting the new credit and financing arrangements" between the parties. (P. Ex. 2, STE 000301). There is no provision that purports to establish that the Restructuring Agreement overrides or controls over the Credit Agreement. (Vol. 1, p. 137; Vol. 2, p. 282). Rather, the Restructuring Agreement overrides prior agreements with NationsBank. (Vol. 1, p. 137). Värde restructured the NationsBank debt as follows:

Secured Debt	Original Principal Amount
Series A Term Loan	$20,000,000
Series B-1 Term Loan	$6,000,000
Series B-2 Term Loan	$500,000
Series B-3 Term Loan	$3,000,000
Series C Term Loan	$4,688,924
Unsecured Debt	
Unsecured Series A Note	$2,500,000
Equity	
Series B Preferred	$9,321,851
Series C Preferred	$5,000,000
Series D Preferred	$2,757,076

(P. Ex. 2, STE 00300-01).

28. Section 6.4 of the Restructuring Agreement provides:

> Final Integration. This Agreement, together with the exhibits and schedules attached hereto and the Related Documents executed and delivered herewith, shall serve as the final integration and the expression of all agreements between Pride and any other party or parties with respect to the subject matter hereof, and any previous agreement, representation or warranty, whether oral or written shall have no further force or effect.

(P. Ex. 2, STE 000318).

29. The Restructuring Agreement provides in Section 1.4(a):

> ***Any proceeds (the "DFSC Proceeds")*** received by Pride in connection with a certain Proposal for Additional Compensation, dated October 24, 1994, from Pride to the Defense Fuel Supply Center, ***shall be applied as follows: (x) the first of $6,000,000 (or, if less, all of such proceeds) to reduce the Series A Term Loan, (y) the next $5,000,000 to ratably reduce each of the respective Series B Term Loans*** or if applicable, redeem the New Preferred Unit A held by Värde provided, however, that funds applied to the redemption of New Preferred Unit A as provided herein shall be so applied with respect to the initial Stated Value of the New Preferred Units being redeemed and any portion of the Redemption Price of such Units attributable to adjustments to Stated Value shall be paid out of other funds of Pride ***and (z) the remainder, if any, shall be paid (i) two-thirds to Pride and (ii) one-third to Värde in immediately available funds, no later than two Business Days after Pride's receipt thereof. To the extent, if any, required by clause (ii) of Section 4.3.5 of the BankBoston Agreement, any amount paid to Värde under clause (z)(ii) of this Section 1.4(a) shall be applied as set forth in such section.***

(P. Ex. 2, STE 000305 (emphasis added)).

30. As both Värde and Pride have acknowledged, the "BankBoston Agreement" is a defined term in the Restructuring Agreement. (Vol. 4, pp. 902-03; Ex. 2, STE 000303). It is defined as "The Revolving Credit and Term Loan Agreement, dated as of December 30, 1997 (the "BankBoston Agreement," and attached hereto as Exhibit E) by and among Pride, BankBoston, N.A. ("BankBoston") and the other parties thereto, pursuant to which BankBoston shall provide $86,000,000 in total aggregate facilities in the forms of (i) a secured letter of credit and revolving credit facility and (ii) a secured term

loan . . . ." (P. Ex. 2, STE 000303). The "BankBoston Agreement" as defined in the Restructuring Agreement does not include or incorporate future amendments to the BankBoston Agreement. (Vol. 1, p. 143). Rather, the BankBoston Agreement is defined as the particular agreement dated December 30, 1997, that was attached as Exhibit E to the Restructuring Agreement. (P. Ex. 2, STE 000303).

31. The BankBoston Agreement is similarly defined as Section 1.1 of the Credit Agreement:

> "BankBoston Credit Agreement shall mean that certain Revolving Credit and Term Loan Agreement, dated as of December 30, 1997 . . . ." (P. Ex. 1, STE 005577).

32. Unlike the Restructuring Agreement and the Credit Agreement, the definition of the "BankBoston Agreement" in the Certificates of Designation includes such agreement as it "may be amended from time to time." (P. Ex. 41).

33. Section 4.3.5 of the BankBoston Agreement attached as Exhibit E to the Restructuring Agreement provides:

> 4.3.5. Proceeds from Legal Claims. The Company shall immediately pay to the Agent as a prepayment of the Term Loan, to be applied as provided in Section 4.6.2, all proceeds from the settlement of or successful prosecution of any legal claims; provided, however, that any proceeds from the DFSC Claim shall be applied as follows: (x) the first $6,000,000 (or, if less, all of such proceeds) to reduce the Term Loan, until such time as the Term Loan shall have been prepaid in full (or, if the Term Loan Closing Date has not yet occurred, to reduce the Värde Term Loan), (y) the next $5,000,000 to redeem Värde Securities and ***(z) the remainder, if any, shall be paid (i) two-thirds to the Company (and need not be applied to prepay the Term Loan) and (ii) one-third to Värde (and must be applied to redeem Värde Securities); provided, that payment on Värde Securities under this Section 4.3.5 shall not be made if an Event of Default has occurred and is continuing and, if there is no such Event of Default, the payment on Värde Securities under this Section 4.3.5 shall be applied first to Indebtedness owing to Värde and then to other Värde Securities.***

(P. Ex. 39, STE 01805 (emphasis added)). Therefore, Section 1.4(a) of the Restructuring Agreement that incorporates Section 4.3.5 of the BankBoston Agreement dated as of December 30, 1997, without amendment, provides that Värde is to apply its allocation of DFSC Proceeds to indebtedness owed to Värde and then to other Värde securities, unless an event of default had occurred and was continuing. (Vol. 1, pp. 146-47).

34. The Restructuring Agreement has never been amended and still incorporates the original BankBoston Agreement, as of December 30, 1997, which was attached as Exhibit E to the Restructuring Agreement. (Vol. 1, p. 145). All amendments to the Restructuring Agreement must be in writing. (P. Ex. 2, STE 000319).

35. The Credit Agreement explicitly detailed the terms of the "new credit and financing arrangement" contemplated in the Restructuring Agreement. (P. Ex. 2, STE 000302). In Section 2.7(e), the Credit Agreement signed by the parties addresses the allocation of the DFSC Proceeds between Pride and Värde and provides:

> (e) Proceeds from Legal Claims. The Borrower shall immediately pay to the Lender as a prepayment of the loans, to be applied as in Section 2.7(f), all proceeds from the settlement of or successful prosecution of any legal claims; provided, however, that from and after the Refinancing Date, the Borrower shall not prepay any Loans under this Section 2.7 until the Term Loan (as defined in the BankBoston Credit Agreement) shall have been prepaid in full; provided, further, however, that ***any proceeds from the DFSC Claim shall be applied as follows: (x) the first $6,000,000 (or, if less, all of such proceeds) to reduce the Series A Term Loan, (y) the next $5,000,000 to ratably reduce each of the respective Series B Term Loans or if applicable, redeem the New Preferred Unit A held by Lender . . ., and (z) the remainder, if any, shall be paid (i) two-thirds to Borrower (and need not be applied to prepay the Loans) and (ii) one-third to Lender (and applied first to prepay any Loans (if not previously prepaid), then to prepay the Series A Unsecured Note, and then to redeem the Preferred Units or New Preferred Units, as the case may be, held by Lender.***

(P. Ex. 1, STE 005601 (emphasis added)). Therefore, Section 2.7(e) of the Credit Agreement states, as does Section 1.4(a) of the Restructuring Agreement, that Värde is to apply its allocation of DFSC Proceeds to Pride's debt and equity in the order specified. No draft, including the final draft, of Section 2.7(e) ever restricted or tied its application to the continued applicability of Section 4.3.5 of the BankBoston Agreement, as amended, as Värde contends. (Vol. 4, p. 939).]

36. Section 2.7(e) is written so that if, at the time the DFSC Proceeds are received by Pride, the debt and equity have been sufficiently reduced, some or all of Värde's one-third of the DFSC Proceeds could be retained by Värde outright. (Vol. 1, p. 208). For instance, had Pride sold its crude gathering system in 1999 for as much as $40 to $45 million, Värde's one-third allocation of the DFSC Proceeds in July 2000 would have completely paid off all debt and equity with money to spare that would have been Värde's to keep. (Vol. 1, p. 210).

37. The 10-Q's and 10-K's filed by Pride with the SEC stated that Värde's one-third of the DFSC Proceeds would be used to retire debt and securities. (Vol. 1, p. 170; Vol. 4, p. 984; P. Exs. 172, 175, 178, 180, 182). Värde received and reviewed these filings, but Värde never advised Pride that these statements were incorrect. (Vol. 1, pp. 152-54, 171).

38. The Credit Agreement was amended numerous times over the years, but Section 2.7(e) was never deleted, amended or modified in any way. (Vol. 1, pp. 155-58). All amendments to the Credit Agreement must be in writing. (P. Ex. 1, STE 005632).

39. The Credit Agreement and the BankBoston Agreement contemplated the occurrence of a Stage 2 Restructuring in which BankBoston would take out the $20 million Series A Term Loan by providing financing for Pride to pay off the outstanding balance to Värde. (P. Ex. 1, STE 000308-09). In April 1998, BankBoston advised Pride and Värde that BankBoston was not going to proceed with the take out of the Series A Term Loan under the Stage 2 Restructuring. (Vol. 1, p. 147).

At that time, Värde sought various concessions from Pride, including the renegotiation of the application requirement as to the DFSC Proceeds. (P. Ex. 290; Vol. 1, pp. 148-49; Vol. 2, pp. 275-77, 352-53). Pride declined to renegotiate the application requirement. (Vol. 2, p. 306). Värde added yet another security when it was unsuccessful in renegotiating the application requirement. (Vol. 1, p. 164).

40. Effective April 15, 1999, Amendment Number Five to the BankBoston Agreement deleted Section 4.3.5. (Vol. 1, p. 158; Ex. 78). On the same day that Amendment Number Five to the BankBoston Agreement was signed, the Sixth Amendment to the Credit Agreement was executed. (Ex. 189). The Sixth Amendment to the Credit Agreement did not, however, amend Section 2.7(e) or delete its application provision. (Vol. 1, p.158). The Sixth Amendment to the Credit Agreement provided that "the Credit Agreement as hereby amended and all other Loan Documents are hereby ratified and confirmed in all respects." (P. Ex. 199, STE 000295). The Sixth Amendment to the Credit Agreement thus ratified and confirmed the application feature of Section 2.7(e) of the Credit Agreement even though Section 4.3.5 of the BankBoston Agreement had been deleted.

41. Again, in October 1999, the parties negotiated and signed another agreement, the Waiver and Consent agreement, by which the parties agreed: "Except as specifically provided herein, the Credit Agreement and all other Loan Documents shall remain in full force and effect and are hereby ratified and confirmed." (P. Ex. 174, STE 000330; Vol. 1, p.158). Thus, Section 2.7(e) of the Credit Agreement was reaffirmed by the parties as written approximately six months after the deletion of Section 4.3.5 of the BankBoston Agreement. (Vol. 1, pp. 158-61).

42. On April 11, 2000, Jason Spaeth received and understood an e-mail sent to him from George Percival that described the requirement that Värde apply its one-third share of DFSC Proceeds "to retire Värde's most senior securities - both debt and preferred equity." (P. Ex. 48; Vol. 2, pp. 462-63).

43. Jason Spaeth never sent a spreadsheet or any other document to Pride from December 30, 1997 to July 25, 2000, that indicated that Värde got to keep its one-third allocation of DFSC Proceeds as a transaction fee. (Vol. 2, p. 478). Each spreadsheet sent to Pride by Värde applied the Värde one-third to debt and equity. (Vol. 2, p. 478; P. Exs. 8, 122). George Hicks admitted that there is no document that was generated internally at Värde from December 1997 until July 27, 2000, that did not show the application of Värde's one-third allocation of the DFSC Proceeds to debt and equity. (Vol. 4, p. 931). Thus, there is no document in evidence, generated by Värde or Pride between December 30, 1997 and July 25, 2000, that indicates that Värde is entitled to the one-third allocation of DFSC Proceeds outright as a transaction fee or inducement to participate in the deal.

44. The Credit Agreement states that New York law shall generally govern the validity, construction and enforcement of the Credit Agreement. It also invokes Texas law in certain provisions. The "maximum rate" of interest is defined in the agreement by reference to "Texas law" and "Tex. Rev. Civ. Stat. Ann. [*sic*] Art. 5069-1.04." (P. Ex. 1, STE 005590). The term "purchase money security interest" is defined by reference to Section 9.107 of the Texas Business and Commerce Code. (P. Ex. 1, STE 005594). Section 1.2(d) of the Credit Agreement provides that any undefined terms in the document shall have the meaning as provided in Chapters 1 and/or 9 of the Texas Business and Commerce Code. (P. Ex. 1, STE 005598).

45. Effective December 30, 1997, Pride issued Certificates of Designation of Series B Cumulative Convertible Preferred Units of Pride Companies, L.P. and substantially similar Certificates of Designation of the Series C and Series D Preferred Units. (Ex. 41; Vol. 1, pp. 253-54). Sections 4(h) of the Certificates of Designation state:

> (h) **Except as otherwise provided in the Restructuring Agreement,** all consideration received by the Company or any Subsidiary in connection with the resolution (by judgment or otherwise)

> or settlement of any judicial, administrative or arbitral proceeding ("Litigation Settlements") shall be applied (or converted into cash and then applied, if applicable) by the Company (i) first, to the payment of all amounts outstanding and due under the Credit Agreement and the BankBoston Credit Agreement; (ii) next, to the payment of all amounts outstanding and due under the Series A Unsecured Note; (iii) then, to the redemption of the outstanding Series B Units in accordance with section 6 hereof; provided, that funds applied to the redemption of Series B Units as provided in cause (iii) shall be so applied with respect to the initial Stated Value of the Units being redeemed and any portion of the Redemption Price of such Units attributable to adjustments to Stated Value shall be paid out of other funds of the Company.

(P. Ex. 41, pp. 10-11 (emphasis added)). Sections 4(h) of the Certificates of Designation refer generally to "consideration" received in connection with a judicial proceeding and do not specifically address the allocation or application of the DFSC Proceeds. Moreover, in Section 2.7(e) of Exhibit D (Credit Agreement) to the Restructuring Agreement, it is specifically "otherwise provided" that Pride's two-thirds of the DFSC Proceeds need not be applied to prepay loans. (Ex.1, STE 00560102; Vol. 2, p. 307).

46. There is a priority to payment of the loans and preferred units. The loans are senior and are to be paid before the preferred units. (P. Ex. 1, STE 005602; P. Ex. 2, STE 000302).

D. Management Notes and Ownership of Debt and Securities

47. At the time Värde purchased Pride's debt, Värde wanted to retain Pride's Management to run the Company. (Vol. 2, p. 352). As a condition to the Värde acquisition of the NationsBank debt, and to assure continuity of existing Management, Värde required Management to purchase a one-third interest in certain of the Värde debt and securities. (P. Ex. 111, STE 020047). The parties negotiated an arrangement whereby Management executed Employment Agreements, Assignment Agreements, and associated Promissory Notes to Värde totaling $2 million in exchange for an undivided one-third share of the following: Series B-1 Term Loan, Series C Term Loan, Series A Unsecured Note, Series B Units, Series C Units and Series D Units (referred to as "Management Securities" or "Executive Securities"). (P. Ex. 206, STE 003135).

48. Each Executive executed an Assignment Agreement, Promissory Note, and Security Agreement with Värde effective December 30,1997. (P. Exs. 40, 198, 202, 203, 204, 205, 206, 207, 226). These agreements are identical for each Executive in all respects except for the name and the amount of the Notes and the amount of the Executive Securities. (Vol. 1, p. 195). As of December 30, 1997, the Promissory Notes owed by Management to Värde and the Management Securities sold by Värde to each Executive were as follows:

	Stephens	Malone	Caddell	Percival
Purchase Price Note	$700,000	$700,000	$400,000	$200,000
B-I Term Loan	$700,000	$700,000	$400,000	$200,000
C Term Loan	$547,041	$547,041	$312,595	$156,297
Series A Unsecured Note	$291,667	$291,667	$166,667	$83,333
Series B Units	$1,087,59	$1,087,549	$621,457	$310,728
Series C Units	$583,333	$583,333	$333,333	$166,667
Series D Units	$326,667	$326,667	$186,667	$93,333

(P. Exs. 13, 40, 203, 206).

49. The Executive Assignment Agreements detail the obligations owed to each Executive with respect to the Executive Securities. (P. Exs. 13, 40, 203, 206). In Section 1.1, Värde assigns a current, undivided interest in the Securities to each Executive in the amounts above in consideration for the Executive's execution of the Promissory Note to Värde in the amount of the purchase price. (Vol. 1, p. 196; P. Exs. 13, 40, 203, 206).

50. In Section 1.2 of the Assignment Agreement, Värde agrees that, upon full payment of the Management Notes, Värde will (i) request Pride to deliver to Management certificates or other evidence of their Executive Securities and (ii) execute any other documents necessary or appropriate to evidence the transfer of record title to Management. (P. Exs. 13, 40, 203, 206).

51. Section 1.3 of each Assignment Agreement provides that the Notes signed by Management are non-recourse obligations payable solely from Pride's distributions and other payments with respect to the Executive Securities. (P. Exs. 13, 40, 203, 206).

52. Section 1.4 of each Executive Assignment Agreement addresses interest paid on the Note. (P. Exs. 13, 40, 203, 206). Section 1.4 provides in pertinent part:

> The Note shall constitute a cash flow obligation only and interest shall be payable from time to time only from, and in amounts equal to, all cash distributions on the Executive Securities (other than distributions that constitute cash payments of principal on the Executive Securities or cash redemptions of the Stated Value of Executive Securities that constitute partnership units of Pride) net of the amount of federal income taxes, if any, payable by the Executive with respect to the applicable cash distribution (such net amount being referred to as an "Interest Payment"). All Interest Payments shall be the property of Värde and shall be applied to the payment of interest on the Note upon receipt by Värde.

(P. Exs. 13, 40, 203, 206). This provision provides that cash interest paid by Pride on the Management Securities will be applied by Värde as interest on the Notes. (Vol. 1, pp. 197-98; Vol. 2, p. 308).

53. Section 1.5 of each Executive Assignment Agreement establishes that the Notes are to be paid with cash payments by Pride of principal on the Executive Securities and cash redemptions by Pride of the Stated Value of the Executive Securities. (Vol. 1, p. 157; P. Exs. 13, 40, 203, 206). The Notes may not be paid by cash payments from other sources by the Executives. (Vol. 1, p. 197). Section 1.5 provides that the Executives can only pay the Notes through payments by Pride of principal on the Executive Securities and that Värde is required to apply all such cash payments of principal on the Executive Securities to the "outstanding principal amount" of the Notes upon receipt by Värde. (P. Exs. 13, 40, 203, 206).

54. Paid-in-kind interest (PIK) is also addressed in Section 1.5 of the Assignment Agreement. (Vol. 2, p. 309). Section 1.1(f) of the Restructuring Agreement provides that Pride's

obligation to make cash interest or dividend payments is limited to $1,090,000. (P. Ex. 2, STE 000302). As to interest and dividends that accrue in excess of this amount, Pride is required to pay it "in kind" by issuing additional notes in the principal amount equal to the dollar amount of accrued but unpaid interest or additional units with an aggregate stated value equal to the dollar amount of accrued unpaid dividends. (P. Ex. 2, STE 000302). Section 1.5 of the Assignment Agreement provides: "All paid-in-kind distributions in respect of the Executive Securities shall constitute Executive Securities and shall not be applied to the payment of principal of or interest on the Note." (P. Exs. 40, 203, 206, 226). This provision establishes that if a paid-in-kind distribution is paid by Pride on the Executive Securities instead of cash interest, the paid-in-kind distribution becomes a new Executive Security, just like the parent security. (Vol. 1, pp. 198-99; Vol. 2, p. 309). Värde prepared analyses that calculated the PIK interest. (Vol. 2, p. 482; P. Exs. 122, 309). The analyses show, and Värde has admitted, that the amount of Management Securities grew by the amount of PIK interest. (Vol. 2, pp. 484-86).

55. The DFSC Proceeds are addressed in Section 1.6 of the Assignment Agreement. It provides that DFSC Proceeds paid to Värde as provided in Section 1.4(a) of the Restructuring Agreement shall be the exclusive property of Värde except for the portion of DFSC Proceeds applied to the payment of the Series B-1 Term Loan. (P. Exs.13, 40, 203, 206). Payments to Värde are provided under Section 1.4(a)(x), (y) and (z)(ii). Payment to Pride is provided under Section 1.4(a)(z)(i). Next, the provision states that notwithstanding that these particular DFSC Proceeds are Värde's only, the Executive's right, title and interest in and to the Executive Securities shall continue. (P. Exs. 203, STE 003050). Finally, Section 1.6 states that if there is outstanding debt or securities and Värde's one-third of the DFSC Proceeds (payments under Section 1.4(a)(z)(ii) of the Restructuring Agreement) is applied to them, Management will have no right to have the Executive Securities participate in such redemption or payment and all such amounts are the exclusive property of Värde. (P. Ex. 203, STE 003050).

56. Sections 1.5 and 1.6 thus provide that the Management Note can be partially paid from the $5 million ratable payment on the Series B Term Loans, which includes the B-1 Note, but any other payment on the Management Notes must derive from the payments to Pride under Section 1.4(a)(z)(i) of the Restructuring Agreement if Pride chooses to make the prepayment. In relevant part, Section 1.6 provides that the Executives do not have the right to participate in Värde's one-third allocation of the DFSC Proceeds paid to Värde by Pride and applied as provided in Section 1.4(a) of the Restructuring Agreement, except that the Executives do have the right to participate in payments made to Värde pursuant to Section 1.4(a)(y) (regarding the Series B-1 Term Loan) of that agreement. (Vol. 2, p. 311). The Executives do not have the right to participate in payments made to Värde by Pride pursuant to Section 1.4(a)(z)(ii) (regarding Värde's one-third allocation). In other words, Värde does not have to apply any of Värde's one-third allocation of DFSC Proceeds to the Management Securities. (Vol. 2, p. 311). There is no prohibition, however, on Pride's use of its two-thirds allocation of DFSC Proceeds to pay on any then outstanding securities; and Management would share in such payment to the extent it holds an interest in such outstanding securities.

57. The Assignment Agreements as executed by Värde and the Executives have an effective date of December 30, 1997. (P. Exs. 13, 40, 203, 206). However, Värde did not forward the final version of these agreements to the Executives for execution until March 9, 1999. (P. Ex. 199). Stephens and Malone actually signed these contracts in July 1999, and Caddell and Percival executed the contracts on April 19, 2000. (Vol. 1, pp. 205-06; Vol. 2, pp. 406-07).

58. The Executives agreed that they would have no voting, distribution, or other rights with respect to the Executive Securities, other than the right to receive distributions. Until the Notes are paid, Värde has complete control over the Executive Securities, other than the right to receive distributions.

E. Pride's DFSC Recovery and Distribution of Proceeds

59. Approximately two and one-half years after the Credit Agreement was signed, Pride won the DFSC case and was awarded $45.7 million in damages plus interest from the United States, amounting to a total recovery of approximately $61 million. (Vol. 1, p. 172; Ex. 75). In filings with the Securities and Exchange Commission (the "SEC') in May 2000, Pride disclosed its intention to use the DFSC Proceeds, net of its attorney's contingency fee interest in the Proceeds, to pay off substantially all of Värde's debt and securities in full and to pay Management bonuses owed pursuant to Pride's executive bonus plan. (P. Ex. 184, STE 019405).

60. Värde knew that Pride's line of credit with BankBoston was going to terminate in the summer of 2000. (Vol. 4, p. 930). Pride began negotiating with Wells Fargo to obtain a new line of credit. Värde was cooperating with Pride in moving the banking relationship to Wells Fargo. (Vol. 2, pp. 407-08).

61. Pride and Värde communicated regarding Pride's anticipated receipt of the DFSC Proceeds. On the day Pride learned of the judge's ruling in its favor, May 10, 2000, George Percival at Pride sent an e-mail to Jason Spaeth at Värde that attached a spreadsheet showing the application of Värde's one-third and a portion of Pride's two-thirds to debt and securities. (Ex. 50; Vol. 1, p. 172). On July 10, 2000, when it became clear that the government was not going to appeal, George Percival began asking Jason Spaeth for a full payoff amount. (Vol. 4, pp. 991-92).

62. In an internal e-mail from Spaeth to Hicks on July 18, 2000, Spaeth reported that he had had a conversation with George Percival who advised that cash from the DFSC lawsuit would be paid by the government within two weeks. (P. Ex. 5). Spaeth's e-mail stated:

Waterfall as follows:	
Proceeds	$60.8
M[cKenna] & C[uneo] Fee	(6.2)
Mgt. Bonus	(6.8)

Net	$47.8
Face Värde Debt	$47.4 (as of 7/31)

(P. Ex. 5). Spaeth's e-mail- concludes: "Perhaps that final trip to Abilene has already been made." (P. Ex. 5). Hicks responded to the e-mail. There is nothing in either Hicks's e-mail or Spaeth's that indicates that Värde expected to receive one-third of the DFSC Proceeds as a transaction fee. (Vol. 3, pp. 723-25).

63. On July 19, 2000, Jason Spaeth called George Percival and left the following voice mail message:

> George, hi, it's Jason calling. Say, I know you're out today, but I wanted to let you know that I sent you a spreadsheet that details management interest, as well as the payoff for us. Still, I'm kind of preparing the payoff letter, so let me know if you see something that you don't agree with on those spreadsheets, but we've dotted our i's and crossed our t's a couple of times on that. So in any event I wanted to also talk with you how, you know, the process would unfold, how we envisioned it. Basically, you know, we expect full VW to come to us under our securities, then we would wire management to whatever accounts, I know you are going to talk with Brad about that, whatever accounts you designate from those proceeds less the amounts due under the $2MM note, and all of those amounts are detailed on the spreadsheet that I sent to you.

(P. Ex. 6 (emphasis added); Vol. 1, pp. 175-78). The voice mail indicated that Värde was anticipating wiring money to Management representing Management's economic interest in the Management Securities. The spreadsheet sent to Percival by Spaeth on July 19, 2000, calculates Management's interest in the securities, and shows what Management was to be paid on the Securities. (P. Ex. 7; Vol. 1, p. 178). The spreadsheet does not reflect that Värde is owed a transaction fee arising from its one-third of the DFSC Proceeds. (P. Ex. 7; Vol. 1, p. 179).

64. This spreadsheet further indicates that Management's total entitlement was $10.089 million on their one-third share of the B-1 and C Term Loans, the unsecured note, and the Preferred Units. (P. Ex. 7). It was Spaeth's testimony that at the time he sent the spreadsheet it was his

understanding that the spreadsheet correctly stated the full payoff owed to Värde. (Vol. 2, pp. 509-12).

65. Although previous spreadsheets had shown the Management Securities growing by the amount of PIK interest, the spreadsheet sent by Spaeth on July 19, 2000, indicates that the amount of PIK interest is being subtracted from the amount to be paid Management on the Management Securities and, according to Jason Spaeth, mistakenly fails to deduct the principal of the $2 million Note owed to Värde. (P . Ex. 7; Vol. 2, pp. 502-13). When Management questioned Spaeth about his computation in a telephone conversation, Spaeth admitted that Värde was claiming that Värde got the PIK interest on Management's Securities. (Vol. 2, p. 369). Despite the language of Section 1.5 of the Assignment Agreement providing that all PIK distributions constitute Executive Securities and shall not be applied as interest on the Note Management owed to Värde, Värde asserted that the cash value of the PIK distributions on the Management Securities had to be paid to Värde as interest on the Promissory Note. (Vol. 2, pp. 502-13). Värde asserted that if Pride paid cash to redeem the PIK obligations under the Management Securities, Management had to "turn around" and pay that cash to Värde "as interest on the Management Note" under Section 1.4 of the Assignment Agreement which required all cash interest to be paid to Värde. (Vol. 2, pp. 502-13).

66. In the morning of July 25, 2000, George Percival at Pride called Jason Spaeth. (Vol. 4, p. 1000). He left a voice mail telling Spaeth that Pride had received the money and was requesting a payoff sheet. (Vol. 4, p. 1000). In response, on the afternoon of July 25, 2000, Spaeth sent a fax (not an e-mail) transmission to Pride, with Hicks's approval, stating: "Attached please find a spreadsheet that summarizes the amount Pride owes Värde as of 7/25/00." (P. Ex. 59; Vol. 1, p. 181). The subject of the faxed letter was "Payment Amount." (P. Ex. 59). Pride understood that these documents were the "payoff letter" referenced in Spaeth's voice mail and requested by Pride. (Vol. 1, p. 181; Vol. 4, p. 1029). The spreadsheet attached to the faxed cover letter from Spaeth reflects that the

total balance owed to Värde was $47,344,242. (P. Ex. 59). There is no indication in the spreadsheet that the amount shown was not the full payoff or that an additional transaction fee or inducement fee was owed or being claimed. (P. Ex. 59; Vol. 1, p. 182). Jason Spaeth's assertion at trial that, after consultation with George Hicks, he chose to use the word "owe" in the fax, rather than "due," to indicate to Pride that Värde was still consulting with its attorney and did not know what amount was due at the time, is not credible. (Vol. 3, p. 688; Vol. 4, p. 920). At trial, Hicks would not corroborate Spaeth's assertion. (Vol. 4, pp. 920-21).

67. The following chart shows (1) the breakdown of the total amounts outstanding as of July 25, 2000, according to the July 25, 2000 payoff spreadsheet (Ex. 59) prepared by Värde and (2) Management's and Värde's shares of the securities, which apportionment is based on the Assignment Agreements Värde required Management to sign at the time of the 1997 restructuring:

Security	Total Balance	Värde Share	Mgt. Share
I. Secured Debt			
Series A Term Loan	3,656,738	3,656,738	-
Series B-1 Term Loan	7,430,649	4,953,766	2,476,883
Series B-2 Term Loan	738,545	738,545	-
Series B-3 Term Loan	4,778,287	4,778,287	
Series C Term Loan	6,166,045	4,110,697	2,055,348
Total Secured Debt 7/25/00	22,770,264	18,238,033	4.532,231
II. Unsecured Series A Note	3,177,056	2,118,037	1,059,019
III. Equity			
Series B Preferred	11,431,755	7,621,170	3,810,585
Series C Preferred	6,131,698	4,087,799	2,043,899
Series D Preferred	3,833,469	2,555,646	1,277,823
Total Equity	21,396,922	14,264,615	7,132,307
Total Debt & Equity	47,344,242	34,620,685	12,723,557

68. DFSC paid Pride a total of $61,521,045 in two installments in satisfaction of Pride's judgment against the DFSC and the prejudgment interest owed on the recovery, respectively.

69. When the $45.7 million judgment was funded by the U.S. Treasury, the contingency fee of $5,908,000 assigned to McKenna & Cuneo, Pride's DFSC attorneys, was immediately deducted from the funds and paid to McKenna & Cuneo, as Spaeth's July 18, 2000, e-mail to Hicks had indicated and acknowledged. (Vol. 1, p. 186). Spaeth testified that he knew that McKenna & Cuneo were owed a fee from the DFSC Proceeds and he did not have a problem with that. (Vol. 2, pp. 446-47).

70. On July 25 and 26, 2000, Pride paid Värde $16,605,604 for application against and as payment in full on the Series A, B-1, B-2 and B-3 Term Loans pursuant to the payoff summary provided to Pride by Värde. (P. Ex. 62; Vol. 2, p. 286). As Dave Caddell explained in his letter to Värde on July 27, 2000, the payment was comprised of $15,179,550 of Värde's portion of the DFSC Proceeds and another $1,426,053 in funds from Pride's portion of the DFSC Proceeds. (P. Ex. 62). Pride wired these funds to Värde before Värde demanded the $17.5 million transaction fee out of the DFSC Proceeds. (Vol. 2, p. 379).

71. As of July 25, 2000, after its receipt of $16.6 million of DFSC Proceeds, Värde had received $39 million on its $29 million investment in Pride. (Vol. 4, p. 793).

72. On July 25, 2000, Pride also paid approximately $5 million to Management as a bonus pursuant to Pride's Annual Incentive Plan. The Annual Incentive Plan included all proceeds of litigation and claims settlements in the cash flow calculation for purposes of determining Management's right to the bonus. (P. Ex. 193, STE 019346). Prior to Pride's making the $5 million payment, Pride's Board of Directors approved the bonus in the total amount of approximately $6.8 million. (P. Ex. 57). Pride informed Värde of its intent to pay the Management bonuses. (P. Ex. 90). Pride contends it was important to pay the bonus to Management at the same time that the DFSC Proceeds were paid to Pride

in order to have current expenses to offset against the phantom income reportable for income tax purposes by those who held the publicly-traded partnership units in Pride at the time the DFSC Proceeds were received. (Vol. 2, p. 317-19).

F. Värde's Contentions and Refusal to Apply Payments

73. On July 26, 2000 (after Pride had paid the $5 million in bonuses to Management and $16.6 million to Värde), Värde claimed, through its attorney, Andy Rosenberg at Paul Weiss (who had, in December 1997 acknowledged his awareness that Värde was not entitled to the one-third outright), that the documents signed by the parties on December 30, 1997, provided that Värde did not have to apply its one-third calculation of DFSC Proceeds to debt and equity and that a $17.5 million transaction fee or "inducement" was due to Värde. (Vol. 1, pp. 183, 186; Vol. 2, p. 380).

74. Värde sent a letter to Pride on July 27, 2000, setting out Värde's contention that it was entitled to one-third of the DFSC Proceeds as "an inducement" to Värde's participation in the underlying "deal." (P. Ex. 63). Värde thus refused to apply $7,948,968 of the $16,605,604 payment it had received from Pride to reduce Pride's debt and securities, applying it instead to Värde's claimed one-third transaction fee. (D. Ex. 406).

75. On July 27, 2000, Pride tendered an additional $8,171,060 to Värde, subject to Värde's dropping its $17.5 million demand for the transaction fee. (P. Ex. 62).

76. Värde refused to drop its demand for the $17.5 million transaction fee and, when it was not paid, sent Pride demands, notices of default and notices of acceleration as to all of the debt and as to mandatory redemption of its preferred units, including acceleration of the $12.7 million of securities that Värde had previously sold to Management. (P. Exs. 64, 98, 95, 96). In its August 1, 2000 letter to Pride, Värde listed its demand as follows:

Section 1.4(a) Payment on Series A and B Loans	$ 8,656,636
1/3 of DFSC Proceeds (Not to be Applied)	$17,577,025

Series A Unsecured Notes and Preferred Units	$24,604,818
	$50,838,479

(P. Ex. 64 at 2).

77. On August 8, 2000, Värde sent a letter to Pride entitled Notice of Event of Default and Acceleration under Sections 8.1 (e) and (f) of the Credit Agreement and Section 8.1(d) of the Credit Agreement purporting to accelerate under Section 8.2 of the Credit Agreement. (Ex. 98).

78. On September 21, 2000, Värde sent a letter to Pride entitled Notice of Additional Events of Default complaining of Pride's failure to provide Quarterly Financial Reports, monthly financial reports and Form 10-Q filed on or around August 15, 2000 with the Securities and Exchange Commission which Värde purported were further bases for acceleration of debt and mandatory redemption under the Certificates of Designation. (Ex. 98).

79. On October 23, 2000, Värde sent a letter to Pride entitled Notice of Additional Events of Default describing additional failures to provide financial reports. (Ex. 98).

G. The Lawsuits

80. On August 3, 2000, Pride filed a declaratory judgment action against Värde in Taylor County, Texas. By the end of the month, Pride had deposited, under court order, $16,300,000 into the registry of the Taylor County Court ($9,360,000 on August 23, 2000; $7,000,000 on August 31, 2000). (D. Exs. 408, 409). Management joined as parties to the litigation, bringing claims that had arisen between Management and Värde concerning Management's one-third interest in the Värde securities.

81. Värde filed an action on August 8, 2000, against the Pride companies in the Supreme Court of the State of New York, No.603414/00, seeking a summary judgment in lieu of complaint for $18.6 million plus interest foreclosure of its collateral. (P. Ex. 216).

82. When Värde filed suit in New York, Pride filed its First Amended Petition in the Taylor County suit seeking injunctive relief prohibiting Värde from proceeding with the New York action

and foreclosing on any of the collateral. A temporary restraining order was issued on August 15, 2000.

83. On August 28, 2000, the Texas court held an evidentiary hearing to consider Pride's request for a temporary injunction against Värde. Värde suggested a compromise at the hearing. Essentially, Värde agreed not to seize or foreclose on Pride's "Collateral," and Pride agreed not to enjoin the summary judgment proceeding, No. 603414/00, that Värde had filed in New York.

84. On August 31, 2000, Värde filed another lawsuit in New York No. 603772/00. (P. Ex. 218). Värde obtained a temporary restraining order in New York on September 7, 2000, enjoining Pride "from transferring or otherwise disposing of any personal or real property (including cash) to the extent of $48,748,820.69 received as a result of its successful litigation against the DFSC."

85. As of that date, Pride had paid to Värde and tendered into the registry of the Taylor County District Court a total of approximately $33.4 million on a total debt owed to Värde of approximately $37 million (excluding Management's interest in the debt and securities). (Vol. 2, pp. 410-11).

86. On October 10, 2000, Värde obtained a ruling from the New York state court granting a preliminary injunction enjoining Pride "from transferring or disposing of any property to the extent of the amount claimed $48,748,820.69." (P. Ex. 14, p. 13).

87. Värde obtained the New York TRO and temporary injunction by, at least in part, failing to advise the New York court that Pride had deposited a tender of $16.3 million into the registry of the Taylor County court and by inaccurately representing in affidavits submitted to the New York State court that illicit bonuses had been paid to Management under an "undisclosed bonus plan," and that Värde did not know what had happened to the rest of the DFSC Proceeds. (Vol. 2, p. 294).

88. Värde's internal documents show not only that the Annual Incentive Bonus Plan had been disclosed to Värde even before Värde purchased Pride's debt (demonstrated also by the fact

that Värde had removed all restrictions on the bonus plan in the December 30, 1997 agreements), but also that in May 2000, and on July 18, 2000, Värde was specifically aware of Pride's intention to make the bonus payments to Management in the amount of approximately $6.8 million out of the DFSC Proceeds and had approved the payments. (P. Ex. 70; Ex. 90; Vol. 2, pp. 444-45).

89. On December 8, 2000, Pride and Management sent a letter notifying Värde of their usury claims pursuant to Section 305.006(b) of the Texas Finance Code. (P. Ex. 76).

90. On January 17-18, 2001, the Pride Companies filed voluntary Chapter 11 bankruptcy petitions.

91. The Taylor County litigation was set for trial on February 1, 2001. On January 30, 2001, Värde removed that litigation to this court. Since that time, Värde has also removed the New York state actions to this court and the matters were consolidated for trial before this court by agreement of the parties.

92. In the years prior to Pride's receiving the DFSC Proceeds, Pride had paid Värde $16,513,303.11 in principal and $5,620,838.11 in interest. (P. Ex. 231).

93. If necessary, these findings of fact shall be considered conclusions of law.

II. Conclusions of Law

A. Jurisdiction

94. This court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. The court determines the issues raised in this dispute constitute core proceedings under 28 U.S.C. 152(b)(2)(O). Moreover, the parties agreed to trial before this court on all issues asserted in the 350th District Court in Taylor County, Texas, and the Supreme Court of New York in Manhattan. *See* Joint Pretrial Order.

B. Choice of Law

95. The threshold question before the court is whether New York or Texas law

applies.

96. When determining which state's choice of law rules apply, a federal court follows the choice of law rules of the state in which it sits. *See Fina v. ARCO,* 200 F.3d. 266, 269 (5th Cir. 2000); *Access Telecom, Inc., v. MCI Telecomm. Corp.,* 197 F.3d 694 (5th Cir. 1999); *St. Paul Mercenary Ins. Co. v. Lexington Ins. Co.,* 78 F.3d 202, 205 (5th Cir. 1996). Texas courts have consistently and routinely honored contractual stipulations regarding choice of law clauses. *See Fina,* 200 F.3d. at 269 (Texas honors contractual choice of law provisions unless the designated law is contrary to a "fundamental policy" of Texas); *Spence v. Glock,* 227 F.3d 308 (5th Cir. 2000) (under Texas law, parties' choice of law provision governs contract claim within its scope); *St. Paul Mercenary Ins. Co.,* 78 F.3d at 205; *Lockheed Martin Corp. v. Gordon,* 16 S.W.3d 127 (Tex. App.– Houston [1st Dist] 2000).

97. Article IX § 9.7 of the Credit Agreement states:

> **GOVERNING LAW. THIS AGREEMENT HAS BEEN PREPARED, IS BEING EXECUTED AND DELIVERED, AND IS INTENDED TO BE PERFORMED IN THE STATE OF NEW YORK, AND THE SUBSTANTIVE LAWS OF SUCH STATE AND THE APPLICABLE FEDERAL LAWS OF THE UNITED STATES OF AMERICA SHALL GOVERN THE VALIDITY, CONSTRUCTION, ENFORCEMENT AND INTERPRETATION OF THIS AGREEMENT AND ALL OF THE LOAN DOCUMENTS.**

(P. Ex. 1).

98. Furthermore, the language in § 6.6 of the Restructuring Agreement is consistent with the choice of law provision of the Credit Agreement, and states as follows:

> Governing Law. The laws of the State of New York (without regard to principles of conflict of laws that would cause the application of the laws of any other jurisdiction) shall govern the construction, interpretation and enforceability of this Agreement in any dispute, case or controversy arising in or under or related to or connected with this Agreement or the relationship between or among the parties hereto.

(P. Ex. 2).

99. The court should give effect to the choice of law reasonably selected, and contracted for, by the parties as long as there is a reasonable relationship[1] to the chosen forum and the designated law is not contrary to a fundamental policy of the state of Texas. *See Fina,* 200 F.3d at 269; *Spence,* 227 F.3d at 308.

100. The transaction bears a significant relationship to the forum since both a substantial portion of the negotiations and the execution of the documents took place in New York.

101. Pride notes that while the Credit Agreement states New York law governs it also references Texas law in defining "maximum rate" of interest and "purchase money security interest." Pride further urges that § 1.2(d) of the Credit Agreement states that any undefined terms in the document shall have the same meaning as set forth in Chapters 1-9 of the Texas Business and Commerce Code. Consequently, Pride (and Management) argues that application of Texas law, including the Texas usury statute, is contemplated. Pride's argument is unpersuasive. First, both the Credit Agreement and the Restructuring Agreement state that the laws of New York govern the enforcement, interpretation, construction, and validity of the documents. Second, the sections of the Credit Agreement cited by Pride merely provide definitions of specific terms and do not alter the application of New York law to substantive disputes.

102. Neither Pride nor Management assert that application of New York law violates any fundamental policy of the state of Texas.

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[1] "Texas courts use the ALI Restatement's "most significant relationship test" for all choice of law cases *except* those contract cases in which the parties have agreed to a valid choice of law clause." *Spence,* 227 F.3d at 311; *Resolution Trust Corp. v. Northpark Joint Venture,* 958 F.2d 1313, 1318 (5th Cir. 1994) (under the Texas rules, in those contract cases in which the parties have agreed to an enforceable choice of law clause, the law of the chosen state must be applied . . . but if the parties have not agreed to an enforceable choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied).

103. Even if Texas has the most significant contacts to a transaction, a choice of law provision that chooses another state's laws will be upheld "as long as the law chosen bears some relation to the transaction." *Admiral Ins. Co. v. Brinkcraft Dev., LTD.,* 921 F.2d 591, 593 (5th Cir. 1991) (court upheld a choice of law provision that specified New York law applies over objection that such provision violated Texas public policy by evading the Texas usury laws) *citing Woods-Tucker Leasing Corp. of Georgia, v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744 (5th Cir. 1981) (choice of Mississippi law upheld despite Texas's more significant contacts and existence of usurious interest if Texas law were to apply).

104. The court will therefore honor the parties' choice of law and apply New York law.[2]

C. Whether DFSC Proceeds Must be Applied

105. The central substantive issue before the court is whether Värde and, to a lesser extent, Pride are required to apply the DFSC Proceeds to the debt and securities held by Värde and Management. The legal theories underlying this issue include a request for declaratory judgment and claims of breach of contract, fraud, fraud in the inducement, usury, and breach of duty of good faith and fair dealing.

106. To resolve the application question, the court must construe various provisions of the parties' agreement, specifically § 1.4(a) of the Restructuring Agreement, § 4.3.5(ii) of the BankBoston Agreement, § 2.7(e) of the Credit Agreement, and §§ 1.2 - 1.6 of the Executive Assignment Agreements. While each of these provisions are referenced in the Statement of Facts, they are also set forth in the Addendum attached hereto and incorporated herein.

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[2]Värde cites to § 35.31 of the Texas Business and Commerce Code to support its contention that the choice of law provision is enforceable and valid. While § 35.51 has been on the books since 1993, not a single case, either federal or state, cites to it. Pride failed to address whether application of § 35.51 was applicable. Notwithstanding the fact that, to date, no court has interpreted the meaning of § 35.51, the transaction between Värde and Pride would seem to be inapplicable to this section pursuant to § 35.51(g).

107. Under New York law, the court must first decide whether the contract is ambiguous. *See Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 443 (2d Cir. 1995); *Sayers v. Rochester Tel. Corp. Supplemental Mgmt Pension Plan*, 7 F.3d 1091, 1094 (2d Cir. 1993); *Space Imaging Europe, LTD. v. Space Imaging L.P.*, 38 F. Supp. 2d 326, 333-34 (S.D. N.Y. 1999). The determination of whether contract terms are ambiguous is a threshold question for the court. *See Independent Energy Corp., v. Trigen Energy Corp.*, 944 F. Supp. 1184 (S.D. N.Y. 1996). But, the primary objective in contract construction is to give effect to the intent of the contracting parties as revealed by the language they use. *See Bourne v. Walt Disney Co.*, 68 F.3d 621, 629 (2d Cir. 1995); *Seiden Associates, Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992); *Record Club of America v. United Artists Records, Inc.*, 890 F.2d 1264 (2d Cir 1989); *Space Imaging Europe, LTD.*, 38 F. Supp. 2d at 334.

108. A contract is ambiguous if it is "readily susceptible" to more than one interpretation. *See Galli v. Metz*, 973 F.2d 145, 153 (2d Cir. 1992); *Care Travel Co. v. Pan American World Airways*, 944 F.2d 983, 988 (2d Cir. 1991). Or expressed differently, a contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the content of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or practice. *See Morse/Diesel*, 67 F.3d at 443; *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996); *Curry Rd., Ltd. v. K-Mart Corp.*, 893 F.2d 509 (2d Cir. 1990). A court determines whether a contract is ambiguous based only on the terms of the contract, not extrinsic evidence. *See Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir. 1990). Parties' rights under an unambiguous contract should be determined from terms expressed in an instrument itself rather than from extrinsic evidence regarding unexpressed terms or judicial views as to what terms might be preferable. *See*

Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 906 F.2d 884, 889 (2d Cir. 1990).

109. "[L]anguage whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in litigation." *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989). Ambiguity also does not exist where one party's view strains the contract language beyond its reasonable and ordinary meaning. *See Independent Energy Corp.*, 944 F. Supp. at 1192. Further, a contract is not ambiguous when the language in it has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion. *See Sayers*, 7 F.3d at 1094-95; *Space Imaging Europe, LTD.*, 38 F. Supp. 2d at 334; *M.H. Segan Ltd. P'ship v. Hasbro Inc.*, 924 F. Supp. 512, 525 (S.D. N.Y. 1996). Under New York law, it is necessary for the court to consider a particular phrase in the context of the entire contract in determining if it is ambiguous. *See In re Okura & Co.*, 249 B.R. 596, 603 (Bankr. S.D. N.Y. 2000).

110. Finally, writings executed as parts of the same transaction are to be read together as part of the same agreement. *See Hauser v. Western Group Nurseries, Inc.*, 767 F. Supp. 475, 489 (S.D. N.Y. 1991). Where there is an express merger clause in the contract, such a provision is definitive proof of integration under New York law. *See Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315 (2d Cir. 1993); *Wechsler v. Hunt Health Sys., Ltd.*, 1999 WL 397751, 7 (S.D. N.Y. 1999).

111. The parties – Pride (with which Management is aligned) and Värde – each contend the contract, as evidenced by the various documents, is unambiguous though they obviously reach different conclusions concerning the DFSC Proceeds.

112. The court agrees with the parties and finds the contract to be unambiguous and not "readily susceptible" to more than one interpretation. *See Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996); *Care Travel Co. v. Pan American World Airways*, 944 F.2d

983, 988 (2d Cir. 1991); *Galli v. Metz*, 973 F.2d at 153. Consequently, the court will look only to the terms and provisions of the contract as executed by the parties and will not consider extrinsic or parol evidence. *See Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990).

113. Pride contends that Värde is required by the terms of the contract to apply its one-third share of the DFSC Proceeds to the Pride debt and equity. On the other hand, Värde claims that because BankBoston dropped out of the deal and § 4.3.5. of the BankBoston Agreement was deleted, there is no requirement that Värde apply its one-third share of the DFSC Proceeds to the Pride debt or equity.

114. The agreement between the parties arises from several documents that form an integrated contract. Resolution of the application question requires an analysis of the various documents. Writings executed as parts of the same transaction are to be read together as part of the same agreement. *See Hauser v. Western Group Nurseries, Inc.*, 767 F. Supp. 475, 488 (S.D. N.Y. 1991). Although Värde claims the Restructuring Agreement is the controlling document, the facts as well as a plain reading of the contract, suggest otherwise. *See* Findings of Fact 27-36.

115. The Restructuring Agreement provides that it, together with the other documents, comprise an integrated agreement.[3] *See id.* Where there is an express merger clause in the contract, such a provision is definitive proof of integration under New York law. *See Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315 (2d Cir. 1993); *Wechsler v. Hunt Health Sys., Ltd.*, 1999 WL 397751, 7 (S.D. N.Y. 1999).

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[3]Paragraph one of the Restructuring Agreement states that "Capitalized terms used herein but not otherwise defined herein shall have the meaning set forth in the Credit Agreement (as hereinafter defined)." *See* Findings of Fact 27-36. Therefore, the parties provided that certain definitions be given to capitalized terms when used in reference to the documents. The term "Related Documents," as referred to in § 6.4 of the Restructuring Agreement, is defined as "this Agreement and all other agreements, instruments and documents (collectively, the "Related Documents."). *See* Restructuring Agreement § 4.1(a).

116. The documents are inextricably linked as components of the overall transaction which is reflected in the numerous references and cross references between the documents. Moreover, the documents are dated and were, for the most part, executed on the same day. Pursuant to New York law, writings executed as parts of the same transaction are to be read together as part of the same agreement. *See Hauser v. Western Group Nurseries, Inc.*, 767 F. Supp. 475, 488 (S.D. N.Y. 1991).

117. The Restructuring Agreement, the BankBoston Agreement, the Credit Agreement, and the Assignment Agreements each specifically address the DFSC Proceeds and their distribution. These documents appear, in some respects, to be irreconcilable upon a first reading of the various provisions contained in the documents. Upon further analysis, however, the court is able to reconcile and harmonize the various provisions contained in the documents that address the DFSC Proceeds. First, while the documents are each part of an overall integrated agreement, the court notes a fundamental distinction concerning the documents that aids the court in reconciling the various provisions contained in the documents: Värde and Pride are the essential parties to the Restructuring Agreement and the Credit Agreement while the Executives (collectively Management) and Värde are the essential parties to the Assignment Agreements. The BankBoston Agreement, to which BankBoston is obviously a party, is specifically referenced by and, to an extent, incorporated into the Restructuring Agreement. The Management Notes, the consideration given by Management for Management's interests in the Pride securities, are certainly a component of the transaction (within the larger overall transaction) by which the Executives were assigned their respective interests under the Executive Assignment Agreements. The court therefore looks to the Restructuring Agreement and the Credit Agreement to determine, as between Pride and Värde, whether the DFSC Proceeds must be applied. The Assignment Agreements do not alter Pride's rights under the Restructuring Agreement and the Credit Agreement. Pride is not a party to the Assignment Agreements. The Assignment Agreements specifically address the Executives' right to

share in the DFSC Proceeds. Their rights, under the Assignment Agreements, are modified to the extent they would receive a different treatment under the Restructuring Agreement and the Credit Agreement as derivative holders (from Värde) of Pride securities.

118. In light of the court's findings regarding the interplay of § 2.7(e) of the Credit Agreement, which clearly requires application of the DFSC Proceeds, with § 1.4(a) of the Restructuring Agreement, which incorporates § 4.3.5 of the BankBoston Agreement, Värde is required to apply its share of the DFSC Proceeds. *See* Findings of Fact 29-36.

119. Värde's theory of the case, under which § 1.4(a) of the Restructuring Agreement "overrides" all other documents thereby eliminating its requirement to apply the DFSC Proceeds, renders § 2.7(e) of the Credit Agreement meaningless[4], which is disfavored under New York law. *See Galli v. Metz,* 973 F.2d 145, 153 (2d Cir. 1994); *Garza v. Marine Transport Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988). "Rather, an interpretation that gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect." *See Galli v. Metz,* 973 F.2d at 153; *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985). Further, where two seemingly conflicting provisions can be reasonably reconciled, a court should do so in order to give both effect, whether two documents are contemporaneous and related or one incorporates the terms of the other. *See Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.,* 992 F.2d 430, 435 (2d Cir. 1993); *Port Chester Elec. Const. Corp. v. HBE Corp.*, 894 F.2d 47, 49 (2d Cir. 1990); *Roleco Service Stations, Inc. v. Getty Refining and Mktg. Co.*, 839 F.2d 88, 92 (2d Cir. 1988); *Proyecfin De Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390 (2d Cir. 1985);

[4]Both parties concede that § 2.7(e) of the Credit Agreement has never been amended. Further, it is significant to note that § 2.7(e) of the Credit Agreement makes no reference whatsoever to the Restructuring Agreement or to the BankBoston Agreement. Finally, all parties concede that § 2.7(e) of the Credit Agreement, read alone, requires Värde to apply its one-third share.

Hauser v. Western Group Nurseries, Inc., 767 F. Supp. 475, 488 (S.D. N.Y. 1991).

120. Section 1.6 of the Executive Assignment Agreements is construed in light of the court's decision that Värde is required to apply its one-third share of the DFSC Proceeds to the outstanding Pride debt and equity.

121. The loan documents provide a specific payment plan that Pride is required to adhere to upon receipt of the DFSC Proceeds. Under §§ 2.7(e) of the Credit Agreement and 1.4(a) of the Restructuring Agreement, upon receipt of the DFSC Proceeds, the first $6,000,000 goes to reduce the Series A Term Loan, the next $5,000,000 goes to ratably reduce each of the respective Series B Term Loans (of which Pride Management has an interest in the B-1 Term Loan), and the remainder, if any, goes (i) two-thirds to Pride (and need not be applied to prepay the Loans) and (ii) one-third to Värde (and is applied to first prepay any Loans, then to prepay the Series A Unsecured Note, and then to redeem the Preferred Units or New Preferred Units, as the case may be, held by Värde).

122. Consequently, upon receipt of the DFSC Proceeds, Pride is first required to deliver $6 million to apply against the Series A Term Loan. Next, Pride is required to deliver $5 million to apply ratably to the Series B Term Loans which consist of the Series B-1 Term Loan, Series B-2 Term Loan, and the Series B-3 Term Loan. At this point, the first sentence of § 1.6 of the Assignment Agreement is triggered. The first sentence provides that all payments received by Värde in connection with the DFSC Proceeds shall be the exclusive property of Värde and the Executive shall have no rights with respect thereto, "other than the portion thereof applied to the payment of the Series B-1 Term Loan . . . as provided in Section 1.4(a)." As stated previously, § 1.4(a) of the Restructuring Agreement and § 2.7(e) of the Credit Agreement require Pride, as a second step after receipt of the DFSC Proceeds, to deliver $5 million to be applied ratably to the Series B Term Loans. Thus, Pride Management is entitled, as referenced in the first sentence of § 1.6 of the Executive

Assignment Agreements, to participate or have their undivided one-third interest share in any pay down of the Series B-1 Term Loan that is achieved through application of the $5 million that is ratably applied to the Series B Term Loans.

123. The next step, after first applying the $6 million to the Series A Term Loan and, second, applying $5 million to the Series B Term Loans, is that the remainder, if any, is applied (i) two-thirds to Pride, which is not required to apply as a repayment against the Loans and (ii) one-third to Värde, which is required to apply as a prepayment against any Loans, then as a prepayment against the Series A Unsecured Note, and then to redeem the Preferred Units or New Preferred Units, as the case may be, held by Värde. Accordingly, upon receipt of its one-third share of the DFSC Proceeds, Värde is required to apply that share to outstanding debt and equity.

124. At this point, the court invokes the last sentence of § 1.6 of the Assignment Agreements which states that each Executive agrees that, of the DFSC Proceeds distributed to Värde pursuant to clause (z)(ii) of § 1.4(a) of the Restructuring Agreement and applied as a payment against Outstanding Securities, the Executive shall have no right to have his Executive Securities participate in such payment and all such amounts shall be the exclusive property of Värde. In accordance with the last sentence of § 1.6 of the Assignment Agreement, Management does not share in this application of Värde's one-third.

125. The practical effect of the interplay between the Restructuring Agreement (with the Credit Agreement) and the Executive Assignment Agreements is that Pride Management participates in the pay down of the Series B-1 Term Loan because it has an undivided one-third interest in such loan, which is recognized by the first sentence of § 1.6 of the Executive Assignment Agreement; however, giving full effect to the last sentence of § 1.6, Pride Management does not participate in a further pay down of the outstanding securities (debt and equity), including the Series B-1 Note, that is made with

Värde's one-third share of the DFSC Proceeds.

126. Though Management does not "participate" in the application of Värde's one-third share, Pride's right to receive full credit for the application against the "Outstanding Securities"[5] is unaffected. Pride contends that to the extent Management does not participate under § 1.6 of the Executive Assignment Agreements, Management's interest in the Outstanding Securities is not satisfied as between Management and Pride and Pride is then free to use its two-thirds to pay Management. The court declines to adopt this argument because it would effectively require Pride to pay twice on Management's interest to the extent it does not participate and would thus violate the clear wording of 2.7(e) of the Credit Agreement, which does not limit Värde's obligation to apply its one-third to the outstanding debt and equity. But, as the last sentence of § 1.6 of the Executive Assignment Agreements states, to the extent Management does not participate, Värde keeps the DFSC Proceeds as its "exclusive property."

127. To the extent there is still outstanding debt and equity after application of Värde's share of the DFSC Proceeds, nothing in § 1.6 prevents Pride from using its two-thirds share of the DFSC Proceeds to satisfy the remaining balance of the Outstanding Securities. The Management Securities would share in a pay down from Pride's two-thirds share (or any further pay down from Pride).

128. Section 4(h) of the Certificates of Designation is not controlling on the issue of application of the DFSC Proceeds. Such provision requires Pride to apply all "Litigation Settlements" to the debt. *See* Finding of Fact 45. First, the court relies on the provisions of the agreement that specifically dictate application of the DFSC Proceeds. *See John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 669 n. 8 (2d Cir. 1983). Second,

[5]*See* § 1.6 of the Executive Assignment Agreements, second sentence, which refers to "Outstanding Securities."

§ 4(h) states that "[e]xcept as otherwise provided in the Restructuring Agreement . . . ," Pride is required to apply Litigation Proceeds. The court finds that the Restructuring Agreement, along with the Credit Agreement, does indeed "otherwise" provide for application or not (on Pride's part) of the DFSC Proceeds. *See id.*

129. The DFSC Proceeds arise from the "DFSC Claim," which is defined in the Credit Agreement to mean "all interests" of Pride in the lawsuit. (P. Ex. 1, STE 005583). To pay attorney's fees, Pride assigned an interest in the lawsuit to McKenna & Cuneo. Accordingly, Pride's two-thirds and Värde's one-third of "the remainder" is determined after netting out the attorney's fees of $5,908,000, as well as the $3,656,738 to be applied against the balance of the Series A Term Loan and $5,000,000 ratably applied to the Series B Term Loans. The total amount recovered on the DFSC lawsuit was $61,521,045. Therefore, Pride's two-thirds is $31,304,204.67 and Värde's one-third is $15,652,102.33.

130. Given the court's construction of the agreement and the specific facts of this case, the DFSC Proceeds were intended to be applied as follows:

(a) $3,656,738 to the Series A Term Loan[6];

(b) $5,000,000 ratably to the Series B Term Loans (B-1, B-2, and B-3), with the Executives sharing in the ratable distribution against the B-1;[7]

Then, from Värde's one-third ($15,652,102.33),

(c) $7,947,481 to satisfy the balance of the Series B Term Loans, in which Management receives no credit on its share of the B-1 because Management

[6]The agreement dictates that the first $6 million goes to the Series A Term Loan, but the balance as of July 25, 2000, was $3,656,738. *See* Finding of Fact 67.

[7]As of July 25, 2000, the total of the Series B Loans was $12,947,481 ($7,430,649 on B-1, $738,545 on B-2, and $4,778,287 on B-3); Management's share of the B-1 was $2,476,883. Finding of Fact 67.

does not participate;

(d) $6,166,045 to satisfy the balance of the Series C Term Loan, in which Management receives no credit because Management does not participate; and

(e) $1,538,576.33 to the balance owing on the Unsecured Series A Notes in which Management does not share because Management does not participate.

D. The PIK Interests

131. The parties do not dispute the existence of PIK interest and do not dispute that PIK interest continues to accrue over the term of the agreement. The question is whether Pride Management has an interest in the PIK or whether, under the contract, Värde is entitled to retain the interest.

132. To begin the analysis of PIK interest, the court must turn to the documents to ascertain how PIK is defined. The documents refer to the term "PIK" or "payment in kind" or "paid in kind" in several locations, with no one definition or document controlling over another.

133. Paragraph two of each Executive Assignment Agreement states that: "Capitalized terms used herein but not otherwise defined herein shall have the meanings set forth in the Restructuring Agreement (including terms defined therein by incorporation by reference of terms defined in the Credit Agreement)." (P. Ex. 40). The term "payment in kind" is not capitalized in the Executive Assignment Agreements.

134. Section 1.2(a) of the Credit Agreement states that "all terms defined in this Agreement shall have the above-defined meanings when used in the Notes or any Loan Documents, certificate, report or other document made or delivered pursuant to this Agreement, unless the context provides otherwise." (P. Ex. 1). The Credit Agreement defines "Loan Documents" as "this Agreement, the Notes (including any renewals, extensions and refundings thereof), the Collateral Documents, the

Intercreditor Agreement, the Restructuring Agreement, each Guaranty and any and all other or additional agreements or documents (and with respect to this Agreement, and such other agreements and documents, any amendments or supplements thereto or modifications thereof) executed or delivered pursuant to the terms of this Agreement." *See id.* at § 1.1. The Credit Agreement then defines "PIK Interest":

> "PIK Interest" shall mean any accrued interest payments on Financing Debt that are postponed or made through the issuance of "payment in kind" notes or other similar securities (including book-entry accrual with respect to such postponed interest payments), all in accordance with the terms of such Financing Debt; provided, however, that in no event shall PIK Interest include payments made with Cash or Cash Equivalents.

Id.

135. Paragraph 2 of § 1.1(f) of the Restructuring Agreement states as follows:

> As used herein, "paid in kind," when used in reference to any distribution payable with respect to any of the Outstanding Securities (as hereinafter defined), means payment of the distribution by issuance of (i) additional notes in the principal amount equal to the dollar amount of accrued but unpaid interest or (ii) additional number of Units (as hereinafter defined) with an aggregate Stated Value (as hereinafter defined) equal to the dollar amount of accrued and unpaid dividends. Units issued as distributions payable in kind shall be duly authorized and validly issued and, upon issuance, shall have rights (including without limitation distribution, voting, conversion and redemption rights) identical to the outstanding Units in respect of which they are issued.

(P. Ex. 2). Under the agreements, a "PIK" or "paid in kind" occurs when an interest or dividend payment is owed on one of the securities, and that payment is not made, the interest will then PIK, or put differently, there will be a new security issued in the principal amount of the amount not paid. Section 1.1(f) of the Restructuring Agreement contemplates that when an interest or payment has been "paid-in-kind," additional notes evidencing the "PIK" will be issued. As recognized by the Credit Agreement, the PIK may accrue on the books pending issuance of the new security. The parties agree that there have not been any new securities actually issued to reflect the "PIK". *See* Trial Transcript (Vol. 1, p. 258).

136. Turning to how the "PIK Interest" is calculated, the first paragraph of § 1.1(f) of the Restructuring Agreement is instructive. It states, in relevant part, that:

> (f) Värde shall reduce the aggregate annual interest and dividend cash payment owed to it by Pride with respect to the Outstanding Securities (as hereinafter defined), other than the Series A Term Loans, to $1,090,000, and Pride shall pay such amount annually in cash as interest and distribution payments on the Outstanding Securities other than the Series A Term Loans. Subject to Section 1.4(f), the amount of interest and dividends in excess of this amount shall be accrued and paid in kind (as hereinafter defined) in the following manner: First, the cash payment shall be applied in the following order: Series B-1 Term Loans, Series B-2 Term Loans, Series B-3 Term Loans, Series C Term Loans, Series A Unsecured Note, Series B Units, Series C Units, and Series D Units (or the New Preferred Unit A, the New Preferred Unit B and the New Preferred Unit C, in the event the Stage 3 Transactions (as hereinafter defined) have been effected). Then, subject to Section 1.4(f), the distribution shall be paid in kind on the remaining securities as to which the interest or dividend was not paid in full in cash.

(P. Ex. 2).

137. If annual interest on the Pride debt and accrued dividends or equity exceed $1,090,000, Pride is required to pay Värde $1,090,000 per year in interest with the excess "paid in kind." The Executive Securities share in the accrual of the PIK which itself becomes new Executive Securities. *See* Executive Assignment Agreement § 1.5; Restructuring Agreement § 1.1(f).

138. As a result, Pride Management's interest increases by the amount of PIK that accrues on the Executive Securities. *See* Executive Assignment Agreement § 1.5.

139. Värde contends that if Värde is required to apply its one-third share of the DFSC Proceeds to the Pride debt (or as phrased specifically in § 1.6 of the Executive Assignment Agreements, the "Outstanding Securities"), then Pride Management does not share in the payoff of the Executive Securities.

140. Pride and Pride Management agree with Värde, arguing that § 1.6 states that the

Executive Securities do not participate in any pay down of the Pride debt if it is achieved with Värde's one-third share of the DFSC Proceeds. However, Pride Management urges that this provision does not preclude Pride from using any of its two-thirds allocation of the DFSC Proceeds to satisfy the Management Note.

141. The language of § 1.5 of the Executive Assignment Agreements specifically provides that all paid-in-kind distributions accruing on the Executive Securities shall also constitute Executive Securities. (P. Ex. 40).

142. Pride Management is entitled to the PIK or, stated another way, the additional Executive Securities that arise from the PIK.

143. The application of the DFSC Proceeds against the accrued PIK interests works the same as with the underlying securities on which the PIK accrues. If, for example, Management has had PIK accrue on the B-1 Term Loan, then Managements shares in the ratable distribution of the $5 million. Likewise, Management's PIK interest, if any, that has accrued on the Series C Term Loan, the Series A Unsecured Note, or the Series B, C, and D Preferred Units does not participate in Värde's application of its one-third share of the DFSC Proceeds. But Management's PIK would share in a further pay down by Pride.

144. To the extent Värde is required to apply DFSC Proceeds against Management's interest – for example, the B-1 Term Loan and Management's interest in the other securities if not paid from Värde's one-third – Värde credits such application as a payment against the Management Notes. *See* Executive Assignment Agreements (P. Ex. 40 § 1.5).

145. As with the underlying securities, Pride receives full credit against the accrued PIK interests upon application of Värde's one-third share of the DFSC Proceeds and Management's interest arising from PIK does not share.

146. The court is unable to determine the amount of PIK accrued on each category of Executive Securities. While Värde calculated the PIK, its calculation appears to aggregate the PIK without a breakdown of the PIK on each security. (*See* P. Ex. 7) (reflects "Accrued Interest and Dividends" which the court understands to include PIK on the Management Note in the amount of $2,537,452.35).

E. If Contract is Ambiguous

147. While the court, as well as the parties, concludes the integrated contract is unambiguous, the court recognizes that, given the complexity of the transaction, a reviewing court may construe the contract to be ambiguous.[8] Upon consideration of extrinsic evidence, the court would reach the same conclusions. Indeed, the court's conclusions from a construction of the documents are further bolstered by consideration of extrinsic evidence.

148. The parties' interpretation of a contract in practice, prior to litigation, is compelling evidence of the parties' intent. *See Ocean Transp. Line, Inc. v. American Philippine Fiber Indus. Inc.*, 743 F.2d 85 (2d Cir. 1984).

149. Over the course of the initial negotiations, the parties exchanged term sheets that represented potential terms and provisions which would ultimately establish the agreement. The term sheets reference Värde's entitlement to one-third of the DFSC Proceeds without specifying their applications to the debt. The Letter of Intent signed by the parties on November 18, 1997, also only required that Värde receive one-third of the DFSC Proceeds with no language requiring Värde to apply

[8]A contract is ambiguous if it is "readily susceptible" to more than one interpretation. *See Galli v. Metz*, 973 F.2d at 153; *Care Travel Co. v. Pan American World Airways*, 944 F.2d 983, 988 (2d Cir. 1991). Or expressed differently, a contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the content of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or practice. *See Morse/Diesel*, 67 F.3d at 443; *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996); *Curry Rd., Ltd. v. K-Mart Corp.*, 893 F.2d 509 (2d Cir. 1990).

the proceeds to the Pride debt.

150. The drafts of the Credit Agreement tell a different story. With one exception, all drafts of the Credit Agreement, at § 2.7(e), required that Värde apply its one-third share of the DFSC Proceeds to the Pride debt. *See* Findings of Fact 17-18. The December 22, 1997, draft of the Credit Agreement included language, inserted by Värde's counsel, providing that Värde would retain its one-third share of the DFSC Proceeds as a transaction fee. Pride objected and the subsequent draft of the Credit Agreement deleted the transaction fee provision and reverted back to the language requiring Värde to apply its one-third share of the DFSC Proceeds to the Pride debt. *See id.* The language of § 2.7(e) has remained unchanged and is memorialized in its current form in the Sixth Restated and Amended Credit Agreement. *See* Findings of Fact 38-41. As a result of Pride's objection and subsequent deletion of the transaction fee language, Värde insisted on, and received, a new $2.8 million security, the Series D Unit, as a transaction fee.

151. After the negotiations had concluded, but prior to closing, Värde's counsel expressed to Pride Management his disappointment that Värde was not to receive its one-third of the DFSC Proceeds outright. *See* Finding of Fact 24. Pride Management reiterated that application of Värde's one-third share to the Pride debt and equity had always been the deal. *See id.* The documents, including the Credit Agreement and Restructuring Agreement, were finally signed and became effective as of December 30, 1997.

152. In 1998, when BankBoston informed the parties that it would not take out the $20 million Series A Term Loan, Värde attempted to renegotiate its position with Pride regarding the procedure for applying the DFSC Proceeds. *See* Finding of Fact 39. Specifically, Värde wanted to amend the agreement to provide that Värde was not required to apply its one-third share of the DFSC Proceeds to the Pride debt. *See id.* Pride refused to renegotiate this point and, instead, agreed to another

transaction fee, which took the form of an additional security. *See id.* This entire exercise was unnecessary if the agreement had been structured as Värde contends.

153. From the date of closing on December 30, 1997, until July 25, 2000, no document, including the spreadsheets prepared by Värde, contradicts Värde's requirement to apply its one-third of the DFSC Proceeds to the Pride debt. *See* Findings of Fact 61-67. This fact supports the court's interpretation of the agreement. *See Ocean Transp. Line, Inc.*, 743 F.2d at 85 (parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent). Only upon receipt of the DFSC Proceeds from Pride did Värde affirmatively assert it was entitled to retain the one-third outright and not apply it to the Pride debt and equity.

154. Värde never questioned the 10Qs and 10Ks it received from Pride which all referenced use of the DFSC recovery to retire Pride's debt to Värde. *See* Finding of Fact 37.

155. The extrinsic evidence weighs heavily in favor of Pride's interpretation of the contract. Further, Värde has no viable explanation for § 2.7(e) of the Credit Agreement which has no limiting language and is not dependant upon any other document or provision. The court's interpretation gives effect to all the terms and provisions of the agreement; an outcome favored under New York law. *See Galli v. Metz*, 973 F.2d 145, 153 (2d Cir. 1992) (an interpretation that gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect). Accordingly, Värde's one-third of the DFSC Proceeds is required to be applied to the outstanding Pride debt.

F. Declaratory Relief

156. The court concludes that declaratory relief is appropriate in this case. Declaratory judgments are procedural in nature and, as such, federal law determines whether a federal court may issue a declaratory judgment. *See Britamco Underwriters, Inc. v. C.J.H., Inc.*, 845 F. Supp.

1090, 1022 (E.D. Pa. 1994), *aff'd*, 37 F.3d 1485 (3d Cir. 1994); *Louisiana Nevada Transit Co. v. Marathon Oil Co.*, 770 F. Supp. 325, 327 (W.D. La. 1991), *aff'd*, 985 F.2d 797 (5th Cir. 1995); *Dinkel Enters. Inc. v. Colvin (In re Bailey Pontiac Inc.)*, 139 B.R. 629, 636 (N.D. Tex. 1992) (Federal Declaratory Judgment Act applies to adversary proceeding in bankruptcy court in which declaratory relief is sought). The parties' reliance on Texas law concerning declaratory judgments is therefore misplaced. Section 2201(a) of 28 U.S.C. provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." It is clear that a bankruptcy court may issue a declaratory judgment. *See Nipon v. Leslie Fay Co. Inc. (In re Leslie Fay Co. Inc.)*, 216 B.R. 117, 134 (Bankr S.D. N.Y. 1997); *Downingtown Indus. & Agric. Sch. v. Commonwealth of Pa. Dep't of Educ. (In re Downingtown Indus. & Agric. Sch.)*, 172 B.R. 813, 819 (Bankr. E.D. Pa. 1994).

157. This lawsuit is the consolidation of pending state court actions in New York and Texas state courts. After removal to this court, the case proceeded to trial on an expedited basis. Moreover, both Värde and Pride request declaratory relief. Given the circumstances of this case, the court construes the pleadings to have properly raised a request for declaratory relief under federal law.

158. A declaratory judgment is defined as one which "declares the rights and duties, or the status, of the parties." 22 Am. Jur. 2d *Declaratory Judgments* § 1 (1988). A declaratory judgment is distinguished from other judgments in that a declaratory judgment stands by itself, involving no executory or coercive relief. *See id.*

159. Declaratory judgments are frequently used to interpret or construe contracts, and to determine the rights of the respective parties. *See Kunkel v. Continental Cas. Co.*, 866 F.2d 1269,

1275 (10th Cir. 1989); *Republic Servs. Inc. v. Texas Ecological Servs. Inc.*, 118 F. Supp. 2d 775 (S.D. Tex. 2000); *Westlands Water Dist. v. U.S. Dep't of Interior*, 805 F. Supp. 1503, 1506 (E.D. Cal. 1992). At least one court has suggested that a declaratory judgment is "*particularly appropriate* where the basic issue underlying plaintiff's action is interpretation or construction of a contract." *Cherry, Bekaert & Holland v. Downs*, 640 F. Supp. 1096, 1102 (W.D. N.C. 1986)(emphasis added). While declaratory judgments are most useful in contract law before a breach has occurred, they are also used to construe contracts after a breach has occurred. *See* Am. Jur. 2d *Declaratory Judgments* § 63 (1988).

160. A declaratory judgment may be issued even though other forms of relief are available, such as money damages. *See* 28 U.S.C. § 2201(a) (2000). The declaratory judgment need not dispose of the case entirely. *See Kunkel*, 866 F.2d at 1274. Rather, a declaratory judgment may be combined with injunctive or monetary relief. *See id.*

G. Fraud and Fraud in the Inducement

161. Pride's[9] fraud claims rest on the assertion that Värde never intended to comply with the contract language. *See* Pride Post-Trial Brief, pp. 12-13. Pride claims that:

> Värde knowingly made a false representation of material fact to Pride that it would apply its one-third of the DFSC proceeds to Pride's debt when it had no intention of doing so. In fact, when Värde and Pride executed the integrated agreements, Värde had the present intent of *not* applying its share of the proceeds to Pride's outstanding obligations. In reliance on Värde's false representation, Pride executed the integrated agreements with Värde. Värde's subsequent refusal to apply its share of the DFSC proceeds to Pride's debt has resulted in damages to Pride.

Pride Post-Trial Brief, p. 14. Pride contends that application of Värde's one-third of the DFSC Proceeds was always intended to be a part of the agreement, which Värde understood. Värde submits the dispute arises solely under contract law, and is one of interpretation of the contract and of whether there was a

[9]Pride and Pride Management are aligned on the issues of fraud and fraud in the inducement of a contract. *See* Pride Management Post-Trial Brief, pp. 4-12; *see* Pride Post Trial Brief, pp. 12-13.

breach of contract.

162. To prevail on a fraud claim under New York law, the plaintiff must prove, by clear and convincing evidence, that (1) a material misrepresentation or omission of fact, (2) made with knowledge of its falsity, (3) with an intent to defraud, and (4) reasonable reliance on the part of the plaintiff, (5) causes damage to the plaintiff. *See Baker v. Dorfman,* 239 F.3d 415, 423 (2d Cir. 2000); *Kaye v. Grossman,* 202 F.3d 611, 614 (2d Cir. 2000); *Schlaifer Nance & Co., Inc., v. Estate of Andy Warhol,* 194 F.3d 323, 336 (2d Cir. 1999).

163. However, it is well established under New York law that a cause of action for fraud does not lie where the only fraud alleged consists of the breach of a contract between the parties. *See Glynwill Inv., N.V., v. Prudential Sec., Inc.,* 1995 WL 362500 at 6-7 (S.D. N.Y. 1995); *G.D. Searle & Co. v. Mediocre Communications, Inc.,* 843 F. Supp. 895, 909 (S.D. N.Y. 1994); *Chase v. Columbia Nat. Corp.,* 832 F. Supp. 654, 660 (S.D. N.Y. 1993); *Vista Co. v. Columbia Pictures Indus., Inc.,* 725 F. Supp. 1286, 1294 (S.D. N.Y. 1989). In order to state a claim for fraud separate from a breach of contract, the plaintiff must allege the breach of a legal duty which exists independent of the contract. *See Glynwill Investments, N.V.,* 1995 WL 362500 at 6-7; *G.D. Searle & Co.,* 843 F. Supp. at 909; *Crabtree v. Tristar Auto. Group, Inc.,* 776 F. Supp. 155, 161 (S.D. N.Y. 1991); *Sudul v. Computer Outsourcing Serv.,* 868 F. Supp. 59, 62 (S.D. N.Y. 1994) (under New York law, "where a fraud claim arises out of the same facts as plaintiff's breach of contact claim, with the addition only of an allegation that defendant never intended to perform the [contractual terms], the fraud claim is redundant and plaintiffs' sole remedy is for breach of contract"); *Strojmaterialintorg v. Russian Am. Commercial Corp.,* 815 F. Supp. 103, 105 (E.D. N.Y. 1993) ("Under New York law, 'a claim predicated on a breach of a contractual arrangement cannot be converted into a fraud claim simply by allegations that a defendant never intended to adhere to its obligations under the agreement.'") (*quoting Carlucci v.*

Owens-Corning Fiberglas Corp., 646 F. Supp. 1486, 1491 (E.D. N.Y. 1986)); *Vista Co.*, 725 F. Supp. at 1294 ("New York law states clearly that an allegation that the defendant 'made the agreement knowing that [he or she] would not abide by it . . . says nothing which is not legally embraced by [a] cause of action for breach of contract.'") (*quoting L. Fatato v. Decrescente Distrib. Co.*, 446 N.Y.S.2d 120, 121 (N.Y. App. Div. 1982)) (alterations in *Vista*).

164. Pride has made no allegation of any legal duty owed to it, independent of the contract, that was breached by Värde. The fraud claim is merely redundant of the breach of contract claim and must therefore be dismissed. *See Glynwill Invs., N.V.*, at 1995 WL 362500 at 6-7; *Rodgers v. Roulette Records, Inc.*, 677 F. Supp. 731, 738 (S.D. N.Y. 1988) (*citing Brignoli v. Balch Hardy and Scheinman, Inc.*, 645 F. Supp. 1201, 1207 (S.D. N.Y. 1986)).

165. The same is true of any claim for fraudulent inducement. While New York courts have held that a plaintiff may sustain a cause of action for fraudulent inducement of a contract as long as the alleged fraudulent conduct concerns a matter collateral, extraneous, or outside of the parameters of the contractual promises, Pride has made no such allegation here. Pride's claims for fraudulent inducement of a contract fall squarely within the bounds of the agreement and are not collateral or extraneous. *See International Cabletel, Inc., v. Le Groupe Videotron Ltee.*, 978 F. Supp. 483, 491 (S.D. N.Y. 1997).[10] *See also O'Connor v. Reader's Digest Ass'n, Inc.*, 1993 WL 291372, 3 (S.D. N.Y. 1993) (while New York law recognizes a cause of action for fraud in the inducement of a contract, the fraud claim cannot be based solely upon the failure to perform the promises of future acts which constitute the contractual obligations themselves); *Triangular Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979). It is well settled that where, as here, "a claim to recover damages for

[10]Fraud in the inducement can be supported under New York law by a false statement of present fact, or by a false statement of future intent which concerns a matter collateral to a contract between the parties. *See International Cabletel, Inc., v. Le Groupe Videotron Ltee.*, 978 F. Supp. 483, 491 (S.D. N.Y. 1997).

fraud is premised upon alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie." *McKernin v. Fanny Farmer Candy Shops, Inc.*, 176 A.D.2d 233, 574 N.Y.S.2d 58, 59 (N.Y. App. Div. 1991).[11]

166. Therefore, Pride and Pride Management's claims for fraud and fraud in the inducement of the contract must fail in accordance with New York law.

H. Breach of Duty of Good Faith and Fair Dealing

167. "Under New York law, parties to an express contract are bound by an implied duty of good faith; however, breach of that duty is merely a breach of the underlying contract." *Union Carbide Corp. v. Montell, N.V.*, 944 F. Supp. 1119, 1136 (S.D. N.Y. 1996). The cause of action for breach of a duty of good faith and fair dealing is merely duplicative of Pride's breach of contract claim. *See William Kaufman Org., Ltd. v. Graham & James, LLP*, 703 N.Y.S.2d 439, 442 (N.Y. App. Div. 2000).

168. Accordingly, the cause of action for breach of the duty of good faith and fair dealing must fail.

I. Pride's Claim of Usury

169. As stated above, the choice of law provision contracted for by the parties is enforceable and will be honored by this court. Accordingly, New York law applies.

170. New York law provides the following limitation on the kinds of entities that may maintain an action for usury: "[n]o corporation shall hereafter interpose the defense of usury in any action. The term corporation, as used in this section, shall be construed to include all associations, and

[11]The *International Cabletel* court also found, notably, that under New York law, a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations. 978 F. Supp. at 486.

joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships." N.Y. Gen. Oblig. Law § 5-521(1) (McKinney 2000).

171. As a limited partnership with limited liability, Pride would appear to fall within the purview of the statute. However, the court has found no reported case law that directly addresses the issue of whether a limited partnership is indeed covered by the statute.

172. Even if Pride is not covered by the statute and can bring an action for usury, the court finds that Värde's claim to its one-third without application does not constitute usurious interest. Under Värde's theory of the case, its entitlement to the DFSC Proceeds was dependent on a contingent event – Pride winning the lawsuit. When parties agree that the payment of an obligation is dependent on a contingent event, New York courts have held that such arrangement is not usurious merely because of the possibility that more than the legal interest will be paid. *See Lehman v. Roseanne Investors Corp.*, 483 N.Y.S.2d 106, 108 (N.Y. App. Div. 1984). *See also Fried v. Bolanos*, 629 N.Y.S.2d 538, 540 (N.Y. App. Div. 1995) (when parties chose to make the term of the loan dependent upon an uncertain event, the term was insufficient to determine an interest rate), *leave to appeal dismissed*, 678 N.E.2d 1351 (N.Y. 1997). Similarly, a loan in consideration of a share in profits, income, or earnings, whether in lieu of, or in addition to, interest is not usurious in the absence of certainty that it will produce a return in excess of the legal rate of interest. *See Brown v. Kahanick*, 161 N.Y.S.2d 545, 546 (N.Y. App. Div. 1957), *aff'd*, 149 N.E.2d 524 (N.Y. 1958); *Richardson v. Hughitt*, 76 N.Y. 55 (1879).

173. In addition, New York law provides that transactions in excess of $2.5 million are "exempt . . . from the operation of any law regulating the payment of interest." *Tides Edge Corp. v. Ctr. Fed. Sav.*, 151 A.D.2d 741, 742, 542 N.Y.S.2d 763, 765 (N.Y. App. Div. 1989). *See also In re Venture Mortgage Fund*, 245 B.R. 460, 475 (Bankr. S.D. N.Y. 2000); *Kredietbank v. Esic Capital Corp. (In re Rosner)*, 48 B.R. 538, 546-47 (Bankr. E.D. N.Y. 1985); *In the Matter of Carla Leather Inc.*, 44

B.R. 457, 469 (Bankr. S.D. N.Y. 1984).

174. Accordingly, Pride's claims of usury must fail.

175. The evidence is insufficient to establish a claim of usury by Management on the Management Notes. The court, therefore, denies such claim.

J. Is Pride's Tender Effective to Halt Accrual of Interest?

176. On July 27, 2000, Värde refused Pride's tender of $ 8.1 million made on the condition that Värde apply such amount to Pride's debt. Finding of Fact 75. In August of 2000, Pride deposited a total of $16,360,000 into the registry of the Taylor County District Court. *See* Findings of Fact 80. Pride contends that its tender of $8.1 million and its placement of $16.3 million into the court's registry relieves Pride of liability for interest accrued after these tenders.

177. Under New York law, it is "well settled that the tender of payment of a debt . . . operates to terminate all incidents of the obligation, such as interest." *Cafferty v. Scotti Brothers Records, Inc*., 969 F. Supp. 193, 205 (S.D.N.Y. 1997). *See also Litwak v. Wolkenberg*, 130 A.D.2d 630, 631, 515 N.Y.S.2d 559, 560 (N.Y. App. Div. 1987). Thus if Pride's tenders were effective, interest stopped accruing on the part of Pride's debt to be satisfied from the tendered funds. New York law defines an effective tender as an "unconditional offer of payment in current coin of the realm of a sum not less than the amount due." *Murphy v. Stirling*, 320 N.Y.S.2d 183, 185 (N.Y. Sup. Ct. 1971) (quoting 59 N.Y. Jur., Tender, § 1).]

178. New York law is clear on the issue of conditional tenders: "in order to be valid as a defense against the accrual of interest running against the debtor, a tender must be shown to be absolute and free from all conditions." *Knab Bros. Inc*., 58 A.D.2d 1016, 1017, 397 N.Y.S.2d 45, 46 (N.Y. App. Div. 1977). *See also Himan v. King Bear Auto Serv. Ctrs.*, 62 A.D.2d 1010, 403 N.Y.S.2d 772 (N.Y. App. Div. 1978). The only condition permitted by New York law that may be placed on a tender is one

that, by the terms of the contract, is a condition to, or simultaneous with, the payment of the debt. *See Halpin v. Phenix Ins. Co.*, 23 N.E. 482 (1890). Thus a tender of payment to a photographer under the condition that the photographer turn over negatives is an effective tender because the condition is a condition precedent by the terms of the contract. *See Colten v. Jacques Marchais Inc*., 61 N.Y.S.2d 269, 271 (N.Y.C. Mun. Ct. 1946).

179. It is undisputed that when Pride deposited the $16.3 million into the court registry, Pride attached conditions for the release of the funds. Namely, the funds can be released only upon order of the court or by agreement of the parties. Värde could not simply walk into the court clerk's office and ask for the funds. Yet the contract between Pride and Värde did not require a court order as a condition precedent to, or simultaneous with, Pride paying on its debt to Värde. The condition placed by Pride on the funds, therefore, does not fall within the exception to New York's prohibition on conditional tenders. As such, Pride's deposit with the court fails the conditionality prong of New York's definition of effective tender. *See, e.g.*, *Murphy v. Stirling*, 320 N.Y.S.2d 183, 185 (N.Y. Sup. Ct. 1971).

180. As stated, to be an effective tender under New York law, the entire amount of the debt must be tendered. "As a general rule, a tender must include everything to which the creditor is entitled, including interest to the time the tender is made, or else it is not legally effective." *Home Sav. of Am. v. Isaacson*, 240 A.D.2d 633, 659 N.Y.S.2d 94, 95 (N.Y. App. Div. 1997) (quoting *National Sav. Bank of Albany v. Hartmann*, 179 A.D.2d 76, 77, 582 N.Y.S.2d 523 (N.Y. App. Div. 1992)). Only a tender for the full amount due will be an effective tender for the purpose of preventing the accrual of interest. *See Affiliated Credit Adjustors Inc. v. Carlucci & Legum*, 139 A.D.2d 611, 613, 527 N.Y.S.2d 426, 428 (N.Y. App. Div. 1988).

181. By Pride's own calculations, Pride owed Värde approximately $37,000,000 after Värde accelerated Pride's debt. At most, Pride paid or tendered $33.4 million. Thus Pride's placement

of the $16.3 million in the court's registry, when added to the other tender and payments, was still less than the total amount due, and was therefore ineffective. *See, e.g.*, *Murphy v. Stirling*, 320 N.Y.S.2d 183, 185 (N.Y. Sup. Ct. 1971).

182. Pride's deposit of the $16.3 million in the court registry therefore fails both prongs of the New York test for an effective tender.

183. As noted, on July 27, 2000, Pride tendered $8.1 million to Värde on the condition that Värde apply these funds to Pride's debt.

184. Värde did not accelerate Pride's debt until at least August 1, 2000. *See* Findings of Fact 75-76. The $8.1 tender was therefore made before acceleration of the debt. Accordingly, if $8.1 million or less was then due, Pride's tender satisfies the requirement of tendering the entire amount due. *See Murphy*, 320 N.Y.S.2d at 185.

185. The condition that Pride placed on the $ 8.1 million tender was that Värde had to apply the money to Pride's debt. New York law permits a conditional tender when the condition is one that by the terms of the contract is a condition to, or simultaneous with, the payment of the debt. *See Halpin v. Phenix Ins. Co.*, 23 N.E. 482 (N.Y. 1890). As the court holds that Värde is indeed bound to apply the DFSC proceeds to Pride's debt, Pride's condition was a condition simultaneous with the payment of Pride's debt. Thus, Pride's tender satisfied the conditionality prong of New York's test. *See Murphy*, 320 N.Y.S.2d at 185.

186. If as of July 27, 2000, $8.1 million or less was due to Värde, Pride's tender of $8.1 million was effective under New York law, and interest on the $8.1 million of Pride's debt ceased accruing as of July 27, 2000.

K. Attorney Fees

187. Pride and Pride Management claim entitlement to attorneys' fees pursuant to §§

37.009 & 38.001 of the Texas Civil Practice and Remedies Code.

188. Värde asserts that it is entitled to attorneys' fees as provided for under the agreements with Pride.

189. As held, the court applies New York law to this dispute, which is consistent with Fifth Circuit case law on the specific question of the applicability of a foreign jurisdiction's law regarding attorney's fees. In *Kucel v. Walter E. Heller & Co.*, the court was forced to decide which state's law applied as between Texas, which provides for the recovery of attorney's fees on a breach of contract claim, and Illinois, which does not have such a statutory provision allowing attorney's fees. 813 F.2d 67 (5th Cir. 1987). The Fifth Circuit held that the "award of attorney's fees is part of the substantive right of a suit." *Id*. Consequently, the award of attorney's fees in a diversity case depends on the law of the state whose rules govern the substantive claims. *See id.* The court reasoned that: "To determine which state's substantive laws control this case, we must follow the choice of law principles of the forum state, Texas." *Id*. Moreover, "for cases involving contracts with choice of law clauses, the rule remains that if the parties agree that the contract will be governed by the laws of a particular state, then that intention prevails." *Id*. In *Kucel*, the choice of law provision stated that Illinois substantive law applied and, thus, the Fifth Circuit held that Illinois law also applied to the issue of attorney's fees. *Id*. at 74.[12]

190. Under New York law, attorney fees generally are not recoverable as damages in an action for breach of contract unless expressly agreed to by the parties. *See McGraw-Hill Co., Inc., v. Vanguard Index Trust*, 2001 WL 427352 (S.D. N.Y. 2001); *3H Enters., Inc., v. Murray*, 994 F. Supp. 403, 404 (N.D. N.Y. 1998); *Hooper Assocs., Ltd., v. AGS Computers, Inc.*, 74 N.Y.2d 487, 549 N.Y.S.2d 365, 548 N.E.2d 903 (1989) (attorney's fees are incidents of litigation and prevailing party may

[12]*See also U.S. for Varco Pruden Bldgs. v. Reid & Gary Strickland Co.*, 161 F.3d 915, 919 (5th Cir. 1998) (holding that Texas law applied to the issue of attorney's fees as pursuant to an enforceable choice of law provision which specified that Texas law would apply).

generally not collect them from losing party unless the award is authorized by agreement between the parties, by statute, or by court rule).

191. In addition, under New York law, a contract provision that one party to the contract is to pay the other party's attorney fees in the event of a breach is enforceable in an amount that is "reasonable." *See 3H Enters.* 994 F. Supp. at 404. Finally, under New York law, contract language must be "unmistakably clear" regarding whether parties to the agreement intend provisions of attorney fees to apply to disputes among themselves. *See Coastal Power International, LTD., v. Transcon. Capital Corp.,* 182 F.3d 163, 164-65 (2d Cir. 1999) (holding an indemnity clause did not clearly state that the loser in a suit for breach of contract was required to pay attorney's fees); *Bridgestone/Firestone, Inc., v. Recovery Credit Servs., Inc.,* 98 F.3d 13, 20-21 (2d Cir. 1996).

192. Värde relies on § 5 of the Restructuring Agreement in asserting its claim for attorney's fees. It provides as follows:

> 5. Indemnities.
>
> Pride, MGP and SGP hereby jointly and severally agree to indemnify and hold Värde and its agents, affiliates, and controlling persons, and each of their officers, partners, directors, and employees (collectively, the "Indemnitees"), harmless from and against any and all expenses (including, without limitation, reasonable attorneys' fees and disbursements), costs, losses, claims, damages, or liabilities (collectively, "Losses") which are incurred by the Indemnities or any of them, caused or in any way resulting from or relating to this Agreement, any of the Related Documents or in connection with any of the transactions contemplated hereby and thereby. Notwithstanding the foregoing, no Indemnitee shall be indemnified for any Losses resulting from (i) adverse market conditions or changes or (ii) the willful misconduct or gross negligence of such Indemnitee.

(P. Ex. 2).

193. "Words in a contract are to be construed to achieve the apparent purpose of the parties." *Hooper Associates, Ltd.,* 548 N.E.2d at 905. "This is particularly true with indemnity

contracts." *Id*. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. *See id.*; *Levine v. Shell Oil Co.,* 28 N.Y.2d 205, 211, 321 N.Y.S.2d 81, 269 N.E.2d 799 (1971); *Kurek v. Port Chester Hous. Auth.,* 18 N.Y.2d 450, 456, 276 N.Y.S.2d 612, 223, N.E.2d 25 (1966). The relevant indemnity provision in *Hooper* provided:

> 9. INDEMNITY
>
> (A) AGS shall at all times indemnify and hold harmless HLTD [Hooper], its successors and assigns and any of its officers, directors, employees representatives, and/or agents, and their heirs, executors, administrators, successors and assigns or each of them against and from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees arising out of:
>
> > (i) Any breach by AGS of any express or implied warranty hereunder and any express representation or provision hereof;
> >
> > (ii) The performance of any service to be performed hereunder;
> >
> > (iii) Infringement of the patent rights, copyright or trademark (of which AGS is not the patentee or assignee or has not the lawful right to use or transfer same) of any person, firm corporation as a result of any use by HLTD, its successors and assigns and any of its officers, directors, employees, representatives, and/or agents of the system hereunder;
> >
> > (iv) The installation, operation, and maintenance of the system; or
> >
> > (v) Mechanic's liens for labor and materials" (emphasis supplied).

Hooper Associates, 548 N.E. 2d at 904. The *Hooper* court held that the indemnity clause did not contain language clearly permitting the plaintiff to recover from the defendant the attorney's fees incurred in a suit against the defendant. *Id*. at 905. The court stated "on the contrary, it is typical of those which

contemplate reimbursement when the indemnitee is required to pay damages on a third party claim." *Id.* Further, the language in the indemnity clause does not support a finding that the defendant promised to indemnify the plaintiff for counsel fees in an action on the contract. *See id.* Accordingly, the court held the parties accountable for their own attorney's fees stemming from the breach of contract. *See id.* at 906.

194. In a later case, the Second Circuit agreed with the *Hooper* court and denied indemnity to a party relying on an indemnity clause for an award of attorney's fees. *See Coastal Power International, LTD., v. Transcon. Capital Corp.,* 182 F.3d 163 (2d Cir. 1999). The indemnity clause in *Coastal Power*, in relevant part, stated:

> each Party . . . hereby agrees to . . . indemnify . . . each Person to whom a representation, warranty, covenant and agreement is made hereunder . . . in respect of any and all Claims it shall incur or suffer, which arise, result from or relate to any breach of, or failure by an Indemnifying Party to perform, any of its representations, warranties, covenants or agreements contained in this Agreement
> . . . .

Id. at 164. Without commenting further, the Second Circuit affirmed the lower court's ruling and held that the contract language at issue "does not clearly state the parties intended the loser in a suit for breach of the agreement to pay the winner's attorney's fees." *Id*.

195. Further, the Second Circuit held the following indemnity was not "unmistakably clear" and thus refused to sustain an award of attorney's fees resulting from a breach of contract:

> [t]he Agency shall indemnify and save [BFI] harmless from any and all claims, demands or causes of action, any and all costs or expenses, including attorney fees, that may be asserted due or arising out of the Agency's collection activity or employee dishonesty deemed contrary to prevailing guidelines on accounts referred by [BFI]

Bridgestone/Firestone, Inc., v. Recovery Credit Services, Inc., 98 F.3d 13, 20-21 (2d Cir. 1996).

196. Section 37.009 and 38.001 of the Texas Civil Practice and Remedies Code is not

applicable and Pride's and Management's request to recover attorney's fees from Värde is denied. To the extent, if any, the indemnity provision contained in the Restructuring Agreement is triggered, the court concludes that such indemnity is not "unmistakably clear" on whether the parties intended Pride to pay attorney's fees to Värde upon the facts and circumstances of this case. *See Hooper Assocs.*, 548 N.E.2d at 905; *Coastal Power,* 182 F3d at 164; *Bridgestone/Firestone, Inc.*, 98 F.3d at 20-21.

L. Lost Profits

197. Pride alleges that as a result of Värde's wrongful conduct and breach of contract, Pride sustained damages in the form of lost profits it would have realized from its expansion into new markets. *See* Pride Post-Trial Brief, pp. 14-15; Trial Transcript (Vol. 3, pp. 601-628).

198. Under New York law, the recovery of lost profits for breach of contract is subject to the following stringent requirements: (1) it must be demonstrated with certainty that such damages have been caused by the breach; and (2) the alleged loss must be capable of proof with reasonable certainty. *See RMLS Metals, Inc., v. International Bus. Machs. Corp.,* 874 F. Supp. 74, 75 (S.D. N.Y. 1995). Or, stated another way, the "damages may not be merely speculative, possible, or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of intervening causes . . ." *Id.* at 76. Moreover, the party claiming entitlement to lost profits must prove that the "particular damages were fairly within the contemplation of the parties to the contract at the time it was made." *Id.* Finally, "if it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty." *Id.*

199. Pride's evidence of lost profits fails to satisfy the strict standard imposed by New York law. Pride's claim of damages is premised on its plan to expand its business into new markets. However, Pride has never marketed their product in the new markets, Pride's expert failed to assess

whether the new markets could sustain another competitor (in an already highly competitive industry), and the nature of the industry is such (few long term contracts for purchase of Pride's product) that calculation of any lost profits is speculative at best. *See* Trial Transcript (Vol. 3, pp. 601-628). Moreover, Pride has struggled to be profitable in its existing markets. *See id.* Accordingly, Pride is not entitled to recover for lost profits as its calculations, as well as their evidence of success in the new markets, is too speculative.

M. Värde's Claims for "Money Had and Received"

200. Värde counterclaims that it is entitled to compensation as a result of actions taken by the Pride Executives. Värde argues that the Pride Executives caused Pride to stop paying down the debt in order to pay themselves a midyear management bonus. To state a claim for money had and received under New York law, a plaintiff must allege: (1) defendant received money belonging to the plaintiff; (2) defendant benefitted from the receipt of money; and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money. *See Barroso, S.A., v. Polymer Research Corp. of America*, 80 F. Supp. 2d 39, 42 (E.D. N.Y. 1999); *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir.1984). "The claim is recognized as an action in implied contract, but as the New York Court of Appeals has observed, the name is something of a misnomer because it is not an action founded on contract at all; it is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another." *Barroso, S.A.*, 80 F. Supp. 2d at 42. *See also Parsa v. State*, 64 N.Y.2d 143, 148, 485 N.Y.S.2d 27, 474 N.E.2d 235 (1984). The cause of action "allows a plaintiff to recover money which has come into the hands of the defendant impressed with a species of trust, and makes a remedy available particularly where one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass." *Barroso,*

S.A., 80 F. Supp. 2d at 42 (internal quotations omitted). Stated differently, a plaintiff may bring an action for money had and received when, in the absence of an agreement, one party possesses money, belonging to another, that in equity and good conscience the party should not retain. *See Nwachukwu v. Chemical Bank*, 1997 WL 441941, 8 (S.D. N.Y. 1997); *Parsa v. State of New York*, 64 N.Y.2d 143, 148, 474 N.E.2d 235, 237, 485 N.Y.S.2d 27, 29 (N.Y.1984). "An action for money had and received is predicated upon the existence of an implied or quasi contract." *Nwachukwu*, 1997 WL 441941 at 8. Nevertheless, "[a] contract: cannot be implied in fact where there is an express contract covering the subject matter involved." *Id. See also Julien J. Studley, Inc. v. New York News. Inc.*, 70 N.Y.2d 628, 512 N.E.2d 300, 518 N.Y.S.2d 779 (1987). Ultimately, the *Nwachukwu* court determined that the parties' relationship was governed by an express contract and thus the existence of an express contract precludes plaintiffs' assertion of a claim based upon an implied contract. 1997 WL 441941 at 8. Notwithstanding Värde's claims, there is an enforceable contract between the parties that controls the rights of the parties. As the court held in *Barroso* and in *Nwachukwu*, the existence of an enforceable express contract between the parties, which controls the rights of the parties, precludes a cause of action based on "money had and received" under New York law. *See Barroso*, 80 F. Supp. 2d at 42 (existence of contract precluded action for money had and received); *Nwachukwu*, 1997 WL 441941 at 8.[13]

N. Conclusion

201. Upon the foregoing findings and conclusions, the court summarizes its ruling as follows:

(a) The total amount recovered on the DFSC lawsuit was $61,521,045.

(b) After netting out the assigned contingent fee to McKenna & Cuneo of

[13]The majority of cases concerning the cause of action for "money had and received" are those involving an improper, mistaken, or fraudulent transfer of funds or monies into another's account where the two parties do not have a contractual arrangement.

$5,908,000, the remaining DFSC Proceeds are $55,613,045.

(c) Given the court's construction of the agreement, the DFSC Proceeds were intended to be applied as follows:

(i) $3,656,738 is applied to satisfy the Series A Term Loan and $5,000,000 is applied ratably to the Series B Term Loans (B-1, B-2, and B-3), with Management sharing in the ratable distribution made against the B-1 Loan.

(ii) $7,947,481 of Värde's one-third ($15,652,102.33) is applied to satisfy the balance of the Series B Term Loans, in which Management receives no credit on its share of the B-1 because Management does not participate.

(iii) $6,166,045 of Värde's one-third is applied to satisfy the balance of the Series C Term Loan, in which Management receives no credit because Management does not participate.

(iv) $1,538,576.33 of Värde's one-third is applied to the balance owing on the Unsecured Series A Notes, in which Management does not share because Management does not participate.

(d) Of the $16,605,604 paid by Pride, the court directs that such amount be applied in accordance with Paragraph (c) above, i.e. $3,656,738 to the Series A Term Loan; $5,000,000 ratably to the Series B Term Loans; and of the balance ($7,948,866.00), which constitutes a portion of Värde's one-third, $7,947,481 to satisfy the balance of the Series B Term Loans, and $1,385 to the Series C Term Loan.

(e) Pride receives full credit (i.e. dollar for dollar) against the outstanding securities upon application by Värde.

(f) PIK has accrued on the outstanding securities, including the Management Securities. To the extent a Management Security participates in any pay down of the outstanding securities, the PIK accrued on such Management Security also participates. Likewise, if a Management Security does not participate, then the PIK accrued on such security does not participate. The evidence is insufficient for the court to determine the PIK that has accrued on each security.

(g) All claims by Pride or Management of fraud or fraud in the inducement are denied.

(h) All claims by Pride or Management of breach of duty of good faith and fair dealing, usury, attorney's fees, and lost profits are denied.

(i) Värde's claims for attorney's fees and for "money had and received" are denied.

(j) By failing to apply the DFSC Proceeds Värde has breached its contract with Pride and Management.

(k) The court's directive to apply the DFSC Proceeds satisfies any damages caused by Värde's breach.

(l) Pride's deposit of the $16,360,000 with the state court was not an effective tender and therefore did not halt the accrual of interest on such amount; however, Pride's tender of the $8,171,060 on July 27, 2000, was an effective tender if the amount then due was less than the amount of

the tender. If so, interest does not accrue on the amount of the tender from July 27, 2000.

(m) The court has determined there is insufficient evidence to determine the PIK that has accrued on each security held by Management. Moreover, the court is uncertain of the debt that was due at the time Pride made the $8.1 million tender on July 27. Finally, the parties have not addressed, and the court has not considered, the effect of Pride's intervening bankruptcy on the nature or amount of Värde's claim. Accordingly, the court has reached no conclusion regarding (i) the net effect of application of the DFSC Proceeds on the Management Securities (and the Management Notes); (ii) the nature and total amount of Värde's claim; or (iii) the propriety and significance of Värde's acceleration of the debt. The parties are instructed to attempt to resolve such issues in light of the court's findings and conclusions. If the parties cannot resolve such issues, the court will conduct a further hearing upon request by the parties.

202. All other relief requested by the parties is denied.

203. If necessary, these conclusions of law shall be considered findings of fact.

204. The court reserves the right to make additional findings and conclusions.

SIGNED September 4, 2001.

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ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

ADDENDUM TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 1.4(a) of the Restructuring Agreement:

(a) Any proceeds (the "DFSC Proceeds") received by Pride in connection with a certain Proposal for Additional Compensation, dated October 24, 1994, from Pride to the Defense Fuel Supply Center, shall be applied as follows: (x) the first $6,000,000 (or, if less, all of such proceeds) to reduce the Series A Term Loan, (y) the next $5,000,000 to ratably reduce each of the respective Series B Term Loans or if applicable, redeem the New Preferred Unit A held by Värde provided, however, that funds applied to the redemption of New Preferred Unit A as provided herein shall be so applied with respect to the initial Stated Value of the New Preferred Units being redeemed and any portion of the Redemption Price of such Units attributable to adjustments to Stated Value shall be paid out of other funds of Pride, and (z) the remainder, if any, shall be paid (i) two-thirds to Pride and (ii) one-third to Värde in immediately available funds, no later than two Business Days after Pride's receipt thereof. To the extent, if any, required by clause (ii) of Section 4.3.5 of the BankBoston Agreement, any amount paid to Värde under clause (z)(ii) of this Section 1.4(a) shall be applied as set forth in such section.

Section 4.3.5 of the BankBoston Agreement:

4.3.5 Proceeds from Legal Claims. The Company shall immediately pay to the Agent as a prepayment of the Term Loan, to be applied as provided in Section 4.6.2, all proceeds from the settlement of or successful prosecution of any legal claims; provided, however, that any proceeds from the DFSC Claim shall be applied as follows: (x) the first $6,000,000 (or, if less, all of such proceeds) to reduce the Term Loan, until such time as the Term Loan shall have been prepaid in full (or, if the Term Loan Closing Date has not yet occurred, to reduce the Värde Term Loan), (y) the next $5,000,000 to redeem Värde Securities and (z) the remainder, if any shall be paid (i) two-thirds to the Company (and need not be applied to prepay the Term Loan) and (ii) one-third to Värde (and must be applied to redeem Värde Securities); provided, that payment on Värde Securities under this Section 4.3.5 shall not be made if an Event of Default has occurred and is continuing and, if there is no such Event of Default, the payment on Värde Securities under this Section 4.3.5 shall be applied first to Indebtedness owing to Värde and then to other Värde Securities.

Section 2.7(e) of the Credit Agreement:

(e) Proceeds from Legal Claims. The Borrower shall immediately pay to the Lender as a prepayment of the Loans, to be applied as provided in Section 2.7(f), all proceeds from the settlement of or successful prosecution of any legal claims; provided, however, that from and after the Refinancing Date, the Borrower shall not prepay any Loans under this Section 2.7 until the Term Loan (as defined in the BankBoston Credit Agreement) shall

have been prepaid in full; provided further, however, that any proceeds from the DFSC Claim shall be applied as follows: (x) the first $6,000,000 (or, if less, all of such proceeds) to reduce the Series A Term Loan, (y) the next $5,000,000 to ratably reduce each of the respective Series B Term Loans or if applicable, redeem the New Preferred Unit A held by Lender provided, however, that funds applied to the redemption of New Preferred Unit A as provided herein shall be so applied with respect to the initial Stated Value of the New Preferred Units being redeemed and any portion of the Redemption Price of such New Preferred Units attributable to adjustments to Stated Value shall be paid out of other funds of Borrower, and (z) the remainder, if any, shall be paid (i) two-thirds to the Borrower (and need not be applied to prepay the Loans) and (ii) one-third to Lender (and applied first to prepay any Loans (if not previously prepaid), then to prepay the Series A Unsecured Note, and then to redeem the Preferred Units or New Preferred Units, as the case may be, held by Lender.

Sections 1.2 - 1.6 of the Executive Assignment Agreements:

1.2 Holding and Voting of Executive Securities. The Executive acknowledges and agrees that the Executive Securities represent an undivided interest in securities and indebtedness acquired by Värde under the Restructuring Agreement and the agreements described therein. The Executive acknowledges receipt of a copy of the Restructuring Agreement and the Credit Agreement and consents to the terms thereof. The Executive acknowledges and agrees that until such time as the Note is paid in full, he shall have no voting, disposition or other rights with respect to the Executive Securities other than the right to receive distributions and other payments thereon, subject to the provisions set forth herein. Värde shall retain all voting rights in respect of the Executive Securities, including, without limitation, the right to amend the terms thereof (so long as any such amendment does not discriminate among securities of the same class), and shall have no obligations whatsoever with respect to the Executive Securities other than the payment obligations set forth herein; provided, however, upon payment in full of the Note in accordance with the terms and conditions of this Agreement, Värde shall (i) request Pride to deliver to the Executive certificates or other evidences of his Executive Securities and (ii) execute such other documents and instruments as may be necessary or appropriate to evidence the transfer of record title in and to the Executive Securities to the Executive.

1.3 Note and Security Agreement. Subject to the terms and conditions hereof, the Note shall constitute a non-recourse obligation of the Executive payable solely from the distributions and other payments with respect to the Executive Securities. To secure the Executive's obligations under the Note and this Agreement, the Executive shall execute and deliver simultaneously with the execution and delivery of this Agreement a Security Agreement in the form attached hereto as Exhibit C (the "Security Agreement") pursuant to which the Executive shall grant to Värde a first priority, perfected security interest in all of his right, title and interest in the Executive Securities.

1.4 Interest on Note. The Note shall constitute a cash flow obligation only and

interest shall be payable from time to time only from, and in amounts equal to, all cash distributions on the Executive Securities (other than distributions that constitute cash payments of principal on the Executive Securities or cash redemptions of the Stated Value of Executive Securities that constitute partnership units of Pride) net of the amount of federal income taxes, if any, payable by the Executive with respect to the applicable cash distribution (such net amount being referred to as an "Interest Payment"). All Interest Payments shall be the property of Värde and shall be applied to the payment of interest on the Note upon receipt by Värde.

Notwithstanding the foregoing provisions of this Section 1.4, if the amount of interest payable under the Note on any interest payment date in respect of the immediately preceding interest computation period would, if based solely upon the provisions of this Section 1.4, exceed the maximum amount allowed by law, the amount of interest payable on such interest payment date shall be automatically reduced to the maximum amount allowed by law. If the amount of interest payable under the Note in respect of any interest computation period is reduced based upon the Maximum Rate (as hereinafter defined) or the maximum amount of interest allowed by law and the amount of interest payable under the Note in respect of any subsequent interest computation period would be less than the maximum amount allowed by law, then the amount of interest payable under the Note in respect of such subsequent interest computation period shall be automatically increased to such maximum amount allowed by law, until such time as the interest that would have been payable under the immediately preceding sentence is fully paid.

For purposes hereof, "Maximum Rate" shall mean, on any day, the highest nonusurious rate of interest (if any) permitted by applicable law on such day that at any time, or from time to time, may be contracted for, taken, reserved, charged or received on the indebtedness evidenced by the Note under the laws which are presently in effect of the United States of America and the State of Texas applicable to the holder of the Note and such indebtedness or, to the extent permitted by law, under such applicable laws of the United States of America and the State of Texas which may hereafter be in effect and which allow a higher maximum nonusurious interest rate than applicable laws now allow. Värde hereby notifies Executive that, and discloses to Executive that, for purposes of Tex. Rev. Civ. Stat. Ann. Art. 5069-1.04, as it may from time to time be amended, the "applicable rate ceiling" shall be the "indicated rate" ceiling from time to time in effect as limited by Art. 5069-1.04(b); provided, however, that to the extent permitted by applicable law, Värde reserves the right to change the "applicable rate ceiling" from time to time by further notice and disclosure to Executive; and, provided further, that the "highest nonusurious rate of interest permitted by applicable law" for purposes of this Agreement and the Note shall not be limited to the applicable rate ceiling under Art. 5069-1.04 if federal laws or other state laws now or hereafter in effect and applicable to this Agreement and the Note (and the interest contracted for, charged and collected hereunder or thereunder) shall permit a higher rate of interest.

1.5 Principal Payments on Note. Until the Note is paid in full, all cash payments of principal on the Executive Securities and cash redemptions of the Stated Value of

Executive Securities that constitute partnership units of Pride shall be retained by Värde and applied to the payment of the outstanding principal amount of the Note upon receipt by Värde. All paid-in-kind distributions in respect of the Executive Securities shall constitute Executive Securities and shall not be applied to the payment of principal of or interest on the Note. The Note may not be paid or prepaid by the Executive other than from the sources described in the first sentence of this Section 1.5 without the prior written consent of Värde; provided, however, that if the Note is not paid in full on the Maturity Date, either Värde or the Executive may elect, upon not less than 30 days written notice to the other party, to extend the Maturity Date for one year (as so extended, the "Extended Maturity Date"). (In addition, if Värde extends the maturity date of the Series B-1 Term Loan or the mandatory redemption date of the New Preferred Unit A to a date later than the Extended Maturity Date, then the Extended Maturity Date shall be deemed to be such later date.) On the Extended Maturity Date, the Executive may pay the Note from any sources of funds unless no less than three months prior to the Extended Maturity Date, Värde, at its option, elects to have the Note paid by the assignment to Värde of all of the Executive's right, title and interest in and to the Executive Securities that constitute the Series B-1 Term Loan or the New Preferred Unit A, whichever is outstanding, in satisfaction of the amount outstanding under the Note. If Värde makes such election, the Executive shall assign the securities free and clear of any Liens and Värde and the Executive shall enter into appropriate documentation to effect the foregoing. Notwithstanding anything to the contrary herein, if the Note is paid in full at a time when the Series A Term Loan remains outstanding and held by Värde (or an affiliate of Värde) or a person (other than an affiliate of Värde) that acquired the Series A Term Loan from Värde for a price of less than par plus accrued but unpaid interest (or any transferee of such person), all payments of cash on the Executive Securities shall be held by Värde in escrow as collateral security for the payment of principal, interest and other amounts payable with respect to the Series A Term Loan (the "Series A Obligations"). If there occurs an Event of Default under the Credit Agreement when Series A Obligations are outstanding, Värde may apply all such collateral to the payment of the Series A Obligations until such Series A Obligations are indefeasibly paid in full. Upon payment in full of the Series A Obligations, the Executive shall be subrogated (together with certain other employees of Pride) to Värde's rights with respect to the Series A Obligations to the extent of the collateral applied hereunder to the payment thereof.

1.6 Other Payments on Värde's Securities. All payments received by Värde in connection with (i) the Call Option, (ii) the DFSC Proceeds paid to Värde other than the portion thereof applied to the payment of the Series B-1 Term Loans or the New Preferred Unit A as provided in Section 1.4(a) of the Restructuring Agreement or (iii) any sale, transfer, assignment or other disposition to any person of all or a portion of the Outstanding Securities shall be the exclusive property of Värde and the Executive shall have no rights with respect thereto; provided, however, that the Executive's right, title and interest in and to the Executive Securities (including, without limitation, the right to receive a transfer of record title to the Executive Securities upon the satisfaction of the conditions therefor set forth herein) shall continue notwithstanding any such transaction (although the record owner thereof may be a person other than Värde following such

transaction). The Executive acknowledges and agrees that if the portion of the DFSC Proceeds distributed to Värde pursuant to clause (z)(ii) of Section 1.4(a) of the Restructuring Agreement is applied to the redemption or payment of Outstanding Securities, the Executive shall have no right to have the Executive Securities participate in such redemption or payment and all such amounts shall be the exclusive property of Värde.